CONSTITUTIONAL LIMITATIONS ON DOMESTIC SURVEILLANCE

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

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CONSTITUTIONAL LIMITATIONS ON DOMESTIC SURVEILLANCE

THURSDAY, JUNE 7, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:19 p.m., in Room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Nadler, Wasserman Schultz, Ellison, Conyers, Scott, Watt, Cohen, Franks, Pence, Issa, and King.

Staff present: David Lachmann, Staff Director; Keenan Keller, Counsel; Kanya Bennett, Counsel; Burton Wides, Counsel; Heather Sawyer, Counsel; Susana Gutierrez, Professional Staff Member; and Paul Taylor, Minority Counsel.

Mr. NADLER. Good afternoon. Today's hearing will examine the constitutional limitations on domestic surveillance.

The Chair recognizes himself for 5 minutes for an opening statement.

Today the Subcommittee on the Constitution, Civil Rights and Civil Liberties begins a series of hearings entitled, "The Constitution in Crisis: The State of Civil Liberties in America."

Through these hearings, the Subcommittee will examine the Bush administration's policies, actions and programs that I believe threaten America's fundamental constitutional rights and civil liberties, and also we will hear proposals for potential legislative remedies.

Today's hearing specifically looks at one of the foundations of our fundamental liberties: the constitutional and statutory restrictions on the Government's ability to spy on people. Both the fourth amendment and the Foreign Intelligence Surveillance Act were responses to abuses by governments that thought they were above the law. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, as the fourth amendment puts it, is a core limitation on the Government that protects each of us.

The framers of the Constitution understood this, and despite periodic lapses, so have most of our Nation's leaders. Congress enacted FISA, the Foreign Intelligence Surveillance Act, in 1978, following the Church Committee's report on surveillance abuses in the 1960's and 1970's.

The FISA reflects timeless understanding that the conduct of foreign intelligence activities is fundamentally different from domestic surveillance. It nonetheless also reflects one of our Nation's founding principles that power, especially the power to invade people's privacy, must never be exercised unchecked.

We rejected monarchy in this country more than 200 years ago. That means that no President may become a law unto him-or herself, even aided by a Vice President. As with every part of Government, there must always be checks and balances. This President appears to have forgotten that fact. Not only has he asserted the right to violate the FISA Act, to go around the FISA court and the Wiretap Act, but he has concededly actually done so.

Even more disturbing, he does not believe that in this and in other things he is accountable to the Congress, the courts or anyone else. This Committee created the FISA statute and the FISA court, yet the President believes this Committee and its Members are not entitled to know what he and that court are doing. The President also believes we are not entitled to know what he is doing or has been doing outside the confines of the FISA statute.

Now we are told, as we have been in the past, that the President needs changes in the FISA statute. Why he needs changes in the FISA statute when he asserts the right to violate it as his whim, I don't know. In any event, we have no way to evaluate his claim of necessity because he has also taken the position that we have no right to know what legal limits he has been observing in his conduct of surveillance or how he came to the legal rationale for those limits, if any.

We have also been told that the President may at anytime resume warrantless surveillance, so past practices bear directly on possible future actions. Many have begun to conclude that the shroud of secrecy thrown over these activities has less to do with protecting us from terrorism and more to do with protecting the Administration from having its law-breaking exposed. The FISA statute is a criminal statute, and surveillance conducted in the name of Government without legal authorization is a crime.

It is my fervent hope that no crime has been committed here, but the more secretive this Administration is, the more concerned I and many other Americans become that they are covering up crimes that they are committing in our name. I will not ask Mr. Bradbury to discuss the operational aspects of any of these programs. No one wants to expose sources and methods in a public forum, but I do expect honest and forthright answers concerning the legal justifications for the Administration's actions.

I want to welcome all of our witnesses and thank them for agreeing to appear before the Subcommittee today. I look forward to your testimony.

Mr. ISSA. Mr. Chairman, parliamentary inquiry?

Mr. NADLER. Would the gentleman state his parliamentary inquiry?

Mr. ISSA. Isn't it against the House Rules to allege a misconduct or illegal act of the President? And isn't that grounds to have words taken down? And isn't it inappropriate under House Rules and this Committee's rules to make allegations of criminal conduct

of the President or the Administration without that being part of an actual investigation?

Mr. NADLER. The answer is, first of all, I don't know if it is against the rules, but in any event, no one has made any allegations of criminal actions. I have said that many Americans, myself included, believe that criminal actions have occurred, but that is not an allegation. It is a statement that I believe that, and I hope it is not correct. That is what I said.

Mr. ISSA. So you don't know it to be true, but you simply believe it. You have no evidence of that, Mr. Chairman. Is that correct?

Mr. NADLER. I think there is evidence. Whether the evidence is sufficient, I don't know, and that is one of the reasons we are having this hearing, to get the facts.

Mr. ISSA. Thank you, Mr. Chairman.

Mr. NADLER. I would now recognize our distinguished Ranking minority Member, the gentleman from Arizona, Mr. Franks, for his opening statement.

Mr. FRANKS. Thank you, Mr. Chairman.

And I thank all of the panelists here for being here with us.

Mr. Chairman, in 1968 when Congress enacted the first Federal wiretapping statute, it included in the legislation an explicit statement that, "nothing in this chapter shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack, or to obtain foreign intelligence information deemed necessary to the security of the United States."

Justice Holmes wrote for a unanimous Supreme Court in 1909 that, "when it comes to a decision by the head of the state upon a matter involving its life, public danger warrants a substitution of executive process for judicial process."

Perhaps one of the most essential functions of the President's authority over foreign affairs and national defense is the collection of foreign intelligence. The President's foreign affairs powers are not exercises in criminal prosecution to secure evidence for prosecuting terrorists in eventual court proceedings. Rather, it is a wartime program of a military nature that requires speed and agility.

Critics of the NSA's Terrorist Surveillance Program are fond of quoting Justice Jackson's concurring opinion in the *Steel Seizure* case, in which he wrote that when the President acts in defiance of "the expressed or implied will of Congress, his power is at its lowest ebb."

But the NSA program does not violate the will of Congress, and the same Justice Robert Jackson also wrote for a majority of the Supreme Court, "the President, both as commander-in-chief and as the Nation's organ of foreign affairs has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the executive taken on information properly held secret."

The same Justice Jackson, as attorney general in the run-up to World War II, carried out warrantless electronic surveillance within the United States at the direction of President Franklin D. Roosevelt. More than 20 years after World War II, in *Katz v. United States,* the Supreme Court held that domestic wiretaps generally

require a warrant and probable cause, but the Supreme Court in the same *Katz* decision expressly conceded the existence of inherent presidential power to act to defend against foreign threats. The court took pains to make it clear it was not speaking to, "a situation involving the national security," as to which, and I quote again, "safeguards other than prior authorization by a magistrate" would satisfy any fourth amendment concern.

Critics have portrayed the NSA's Terrorist Surveillance Program as "domestic spying," but that is not an accurate description of what we know at this classified program. As the Justice Department has explained, the President has authorized the NSA to intercept international communications into and out of the United States where there is a reasonable basis for believing that one of those persons is linked to al-Qaida or related terrorist organizations. The program only applies to communications where one party is located outside of the United States.

Both before and after the enactment of FISA, all Federal appellate courts that had directly confronted this issue have found that the President is constitutionally empowered under article II to conduct warrantless electronic surveillance when the President deems it necessary to protect the Nation from foreign threats. Although critics now claim that Congress, when it enacted the FISA statute, somehow diminished the President's authority under article II of the Constitution, the Foreign Intelligence Surveillance Court of Review, which is the most specialized tribunal as to FISA, has rejected that proposition.

In 2002, the Court of Review stated that, "all courts who have decided the issue have held that the President did have the inherent authority to conduct warrantless searches to obtain foreign intelligence information. We take for granted that the President does have that authority, and assuming that is so, FISA could not encroach on the President's constitutional power."

Congress can always find, Mr. Chairman, a way to cut funding for a program, but Congress may not invade the President's central prerogatives. Those constitutional prerogatives were not changed when Congress enacted the FISA statute.

As we face the jihadist threat in the world, the NSA surveillance program is one that is constitutional and vital to the safety and survival of this republic. Mr. Chairman, if we have empowered the President to hunt down and ferret out and kill terrorists, if as the President of the United States the Constitution empowers him to hunt down and ferret out and kill terrorists, surely he has the authority to listen to them on the telephone before he proceeds.

With that, I look forward to hearing from our witnesses. Thank you.

Mr. NADLER. Thank you.

I now recognize the Chairman of the full Committee for a statement.

Mr. CONYERS. Thank you, Subcommittee Chairman Nadler. I commend you and the Ranking Member because today's hearing is an important first step that will enable us to learn what our Government is doing and whether their actions are grounded in law.

I do hope we can begin to obtain clearer answers to these questions. The reason that I think that we will is the nature of the

membership of the panel this afternoon. Most of them I am familiar with, and I think this is an excellent, excellent beginning.

We have some questions. How was the Administration's program of warrantless surveillance allowed to take effect? And when will this Administration begin to provide this Committee with the information so that we can do our job? And then how can we consider the Administration's proposed legislative changes in the face of such a vacuum?

I have much else to say, but I want to hear from the witnesses more than I want to tell you what I am asking. It will be included in my remarks, by unanimous consent.

Mr. ISSA. Mr. Chairman? I seek to make an opening statement also.

Mr. NADLER. [off-mike] witnesses, and we are going to have votes here soon. I would ask that other Members submit statements for the record.

Mr. ISSA. I would be glad to submit primarily for the record, but just make a short correcting opening statement.

Mr. NADLER. Okay. The Chairman took 1½ minutes.

Mr. ISSA. Thank you. I respect the senior Member of this Committee a great deal and will do the same.

Mr. Chairman, both yourself, as Subcommittee Chairman, and the full Committee Chairman in your opening remarks made certain claims that I think deserve to be put on the record as part of the opening.

First of all, the people who should be on the witness stand today are Speaker Nancy Pelosi, Ms. Jane Harman, and Chairman Sil Reyes. These three people throughout their periods of time, beginning with the now-speaker of the House, had direct and individual knowledge before, during and in the entire period of President Bush's administration as to all efforts, not just those that went to FISA, but all efforts.

In fact, this Administration, and I am a Member of the Select Intelligence Committee, and as I am sure the Chairman is very aware, we are fully briefed, and the Chair and Ranking Member of that Committee, particularly, are fully briefed as to everything, including the individual actions and executive orders of the President.

So to say here today "we want to know what was going on," I believe is less than fully genuine, unless we include the fact that we have Members, including the speaker of the House, who are fully informed and have that knowledge and have had it throughout.

In closing, I would say that, yes, Heather Wilson has been pushing for the last 4 years to open up and reform FISA, but that is in response to individuals saying if you don't have the authority, then let's get you the authority to do it under the court. That is, in fact, what we should be doing here today. I would hope that FISA reform is on the Chairman's agenda.

I yield back.

Mr. NADLER. I thank the gentleman.

Let me simply observe that the gentleman as a Member of the Intelligence Committee may be briefed but this Committee is not briefed.

Frankly, I care less about the Intelligence Committee than I do about this Committee. This Committee has jurisdiction over FISA. This Committee has jurisdiction over the fourth amendment. And this Committee has been refused information by the Administration. We have been offered that the Chairman and the Ranking Member will be briefed. That is not sufficient. Mr. Conyers and I have written to the Administration to that effect.

We believe that under the Constitution and the laws, this Committee must be fully briefed, because otherwise we can't legislate.

Mr. ISSA. Mr. Chairman, I fully agree with you, but it is the Rules of the House that determine that.

Mr. NADLER. The Rules of the House give us the jurisdiction, and therefore the right to be briefed.

Mr. ISSA. And the speaker of the House could make that change. Thank you, Mr. Chairman.

Mr. NADLER. In the interests of proceeding to our witnesses, and mindful of our busy schedules, I would ask that other Members, if any, submit their statements for the record.

Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record, to revise and extend their remarks, and to include additional materials in the record.

Without objection, the Chair will be authorized to declare a recess of the hearing, which we will do if there is a vote. We do expect a vote during the hearing. I will declare a recess when there are 5 minutes left on the 15-minute vote. There will be two votes probably, so that means we should resume in 10 minutes or 12 minutes. I would ask that Members return as soon as they can cast their votes on that second vote.

As we ask questions of our witnesses, the Chair will recognize Members in the order of their seniority on the Subcommittee, alternating between majority and minority, provided that the Member is present when his or her turn arrives. Members who are not present when their turn begins will be recognized after the other Members have had the opportunity to ask their questions. The Chair reserves the right to accommodate a Member who is unavoidably late or only able to be with us a short time.

I will now introduce our witnesses.

Our first witness is Steven Bradbury, the principal deputy assistant attorney general for the Office of Legal Counsel of the U.S. Department of Justice. He received his undergraduate degree from Stanford University in 1980, his law degree from Michigan in 1988. He served as clerk to Judge James L. Buckley from New York on the U.S. Court of Appeals for the D.C. Circuit from 1990 to 1991, and Justice Clarence Thomas on the Supreme Court of the United States from 1992 to 1993.

Our next witness is Bruce Fein. In the Department of Justice, he served as associate deputy attorney general, assistant director in the Office of Legal Policy, and special assistant to the assistant attorney general for antitrust. He is also the former general counsel at the Federal Communications Commission. Mr. Fein graduated Phi Beta Kappa from the University of California at Berkeley in 1969, cum laude from Harvard Law School in 1972, and then

clerked for United States District Judge Frank Kaufman in the District of Maryland.

Lee Casey is a partner with the firm of Baker Hostetler. He served in the Justice Department in the Office of Legal Counsel from 1992 to 1993, and the Office of Legal Policy from 1986 to 1990. From 1990 to 1992, Mr. Casey served as deputy associate general counsel at the U.S. Department of Energy. He earned his B.A. magna cum laude from Oakland University and his J.D. cum laude from the University of Michigan Law School. He clerked for Judge Alex Kozinski, then chief judge of the United States Claims Court.

Jameel Jaffer is the director of the National Security Project for the American Civil Liberties Union Foundation, and has litigated several significant cases involving Government secrecy and national security. Mr. Jaffer is a graduate of Williams College, Cambridge University, and Harvard Law School. He was an editor of the Harvard Law Review from 1997 to 1999, and his writing has appeared in that journal as well as in the Journal of Transnational Law and Policy. After law school, Mr. Jaffer served as law clerk to the Honorable Amalya Kearse, United States Court of Appeals for the Second Circuit.

Our final witness is Louis Fisher, specialist in constitutional law in the Library of Congress. Dr. Fisher worked for the Congressional Research Service from 1970 to 2006. Dr. Fisher received his Ph.D. from the New School for Social Research in 1969. Among his many publications are "Constitutional Conflicts Between Congress and the President," and "Presidential War Power," both quite relevant now.

I am pleased to welcome all of you, and I thank you for your testimony. Your written statements will be made part of the record in its entirety. I would ask that you now summarize your testimony in 5 minutes or less each.

To help you stay within that time limit, there is a timing light at your table in fact, too. When 1 minute remains, the light will switch from green to yellow, and then to red when the 5 minutes are up.

Before we begin, I would ask to swear in our witnesses. If you could please stand and raise your right hand to take the oath.

[Witnesses sworn.]

Let the record reflect that each of the witnesses answered in the affirmative.

We will begin with the first witness, Mr. Bradbury.

TESTIMONY OF STEVEN BRADBURY, PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. BRADBURY. Thank you, Chairman Nadler, Chairman Conyers, Ranking Member Franks and Members of the Subcommittee. It is an honor to appear before you today.

In the wake of the attacks of 9/11, the President authorized the National Security Agency to establish an early warning system to detect and prevent further terrorist attacks against the United States. Under the Terrorist Surveillance Program, as described by the President, the NSA targeted for interception international com-

munications into and out of the United States where there was probable cause to believe that at least one party to the communication was a member or agent of al-Qaida or an associated terrorist organization.

Trained intelligence professionals made the decisions to target communications for interception subject to extensive reviews. Key Members of Congress were briefed on the program from its inception, and it was subsequently briefed to the full membership of both Intelligence Committees, which have conducted in-depth oversight of the program and all related intelligence activities.

In the spring of 2005, well before the first press accounts disclosing the existence of the Terrorist Surveillance Program, the Administration began exploring options for seeking authorization for the program from the Foreign Intelligence Surveillance Court. On January 10, 2007, a judge of that court issued innovative and complex orders that ensure that the intelligence community can operate with the speed and agility necessary to protect the United States from al-Qaida.

As a result of these orders, any electronic surveillance that was occurring as part of the Terrorist Surveillance Program is now subject to the approval of the FISA Court, and in light of that achievement, the President determined not to reauthorize the program.

Nevertheless, I do wish to emphasize that the President definitely had the authority to authorize the Terrorist Surveillance Program under acts of Congress and under the Constitution. As explained in greater detail in the Department of Justice's January, 2006 white paper, a copy of which I ask to be placed in the record, article II of the Constitution charges the President with the primary duty to protect the Nation from armed attack, and the Constitution grants the President the full authority necessary to carry out that duty.

Thus, it is well-established that the President has constitutional authority to direct the use of electronic surveillance for the purpose of collecting foreign intelligence information, and this conclusion is even stronger when the surveillance is undertaken to prevent further attacks against and within the United States, particularly in the context of an ongoing congressionally authorized armed conflict.

Furthermore, the authorization for the use of military force of September 18, 2001, as construed by the Supreme Court in *Hamdi v. Rumsfeld,* and confirmed by history and tradition, authorized the executive branch to conduct such surveillance. This conclusion holds notwithstanding the exclusive means provision of FISA because the AUMF is a statute authorizing the conduct of electronic surveillance within the meaning of section 109(a)(1) of FISA.

At a minimum, interpreting FISA to prohibit the President from authorizing foreign intelligence surveillance against al-Qaida, a diffuse network of foreign terrorist enemies who have already successfully attacked the United States and have repeatedly vowed to do so again, would raise a serious question about the constitutionality of FISA. Statutes must be interpreted, if fairly possible, to avoid raising such constitutional concerns. FISA and the AUMF can fairly be read together to do just that.

In any event, the Terrorist Surveillance Program is no longer operational. It is now imperative, in our view, that Congress and

the executive branch cooperate to close critical gaps in our intelligence capabilities under FISA, while ensuring proper protections for the civil liberties of U.S. persons. FISA has been and continues to serve as the foundation for conducting electronic surveillance of foreign powers and their agents in the United States.

The most serious problems with FISA stem from the fact that FISA defines the term "electronic surveillance" in a way that depends upon communications technology and practices as they existed in 1978. This technology-dependent approach has had dramatic, but unintended, consequences sweeping within the scope of FISA a wide range of communications intelligence activities that Congress originally intended to exclude. As a result, our intelligence capabilities have been hampered, and the intelligence community, the Department of Justice, and the FISA Court have had to expend precious resources on court supervision of intelligence activities that are directed at foreign persons overseas.

To rectify these problems, the Administration has proposed comprehensive amendments to FISA that would make the statute technology-neutral, enhance the Government's authority to secure assistance from private entities in conducting lawful foreign intelligence surveillance activities, and streamline the application and approval process before the FISA Court. Privacy and security are not mutually exclusive. By modernizing FISA, we can both provide the intelligence community with an enduring, agile and efficient means of collecting critical foreign intelligence information, and strengthen the privacy protection for U.S. persons in the United States.

Again, Mr. Chairman, thank you for the opportunity to appear today to discuss these important issues.

[The prepared statement of Mr. Bradbury follows:]

PREPARED STATEMENT OF STEVEN G. BRADBURY

Department of Justice

STATEMENT

OF

STEVEN G. BRADBURY
PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
DEPARTMENT OF JUSTICE

BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING
THE TERRORIST SURVEILLANCE PROGRAM AND
THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA)

PRESENTED ON
JUNE 7, 2007

STATEMENT

OF

STEVEN G. BRADBURY
PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
DEPARTMENT OF JUSTICE

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CONCERNING
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THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA)

PRESENTED ON
JUNE 7, 2007

Thank you, Chairman Nadler, Ranking Member Franks, and Members of the Subcommittee. I appreciate the opportunity to appear here today to discuss the President's constitutional authority to conduct electronic surveillance and how this authority relates to the Terrorist Surveillance Program and the Foreign Intelligence Surveillance Act ("FISA").

It has been almost six years since the attacks of September 11, 2001, the single deadliest set of foreign attacks on U.S. soil in our Nation's history. Nevertheless, we continue to confront a determined and deadly enemy that is fully committed to launching additional catastrophic attacks against and within the United States. Al Qaeda continues to demonstrate its ability to execute mass attacks as evidenced by, among other things, bombings in Bali, Madrid, London, and Iraq. We and our allies also have narrowly

averted additional attacks, some of which are public knowledge and others of which must remain classified.

In the wake of the attacks of September 11th, the President authorized the Terrorist Surveillance Program in order to establish an early-warning system to detect and prevent further terrorist attacks against the United States. As described by the President, under that Program the NSA targeted for interception international communications into and out of the United States where there was probable cause to believe that at least one party to the communication was a member or agent of al Qaeda or an associated terrorist organization. Highly trained intelligence professionals made the initial decision to target communications for interception, subject to rigorous oversight by attorneys and officials at the NSA. The Terrorist Surveillance Program was subject to unprecedented scrutiny by the NSA itself, as well as oversight by other parts of the Executive Branch, including the Department of Justice. In addition, the Program required reauthorization by the President every 45 days to ensure that it was still necessary and that it complied with the Constitution. Key Members of Congress were briefed on the Program from its inception, and it was subsequently briefed to the full membership of both intelligence committees.

In the spring of 2005—well before the first press accounts disclosing the existence of the Terrorist Surveillance Program—the Administration began exploring options for seeking authorization for the Program from the Foreign Intelligence Surveillance Court ("FISC"). Any court authorization had to ensure that the Intelligence Community would be able to operate with the speed and agility necessary to protect the United States from al Qaeda and associated terrorist organizations—the very speed and agility that the Terrorist Surveillance Program afforded to the Intelligence Community.

On January 10, 2007, a judge of the FISC issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that at least one of the participants to the communication is a member or an agent of al Qaeda or an associated terrorist organization. The orders issued by the FISC are innovative and complex; it took considerable time and effort for the Government to develop a sound approach that could be proposed to, and approved by, the FISC. The Attorney General recently explained that as a result of these orders, any electronic surveillance that was occurring as part of the Terrorist Surveillance Program is now subject to the approval of the FISC. Under these circumstances, the President determined not to reauthorize the Terrorist Surveillance Program when the last authorization expired. Accordingly, the Program is no longer operational.

Nevertheless, I wish to emphasize that the President had ample authority to authorize the Terrorist Surveillance Program under acts of Congress and the Constitution. As explained in greater detail in the Department of Justice's *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006) ("*Legal Authorities*"), a copy of which I ask be placed in the record for this hearing, the Authorization for the Use of Military Force ("Force Resolution"), Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001), authorizes the President to "use all necessary and appropriate force" against those persons, organizations, and nations responsible for the September 11th attacks. A majority of the Supreme Court concluded in *Hamdi v. Rumsfeld* that with these words, Congress authorized the President to undertake all "fundamental and accepted . . . incident[s] to war." 542 U.S. 507, 518 (2004) (plurality opinion); *id.* at 587 (Thomas, J., dissenting). Intercepting the communications of the foreign enemies of the United States has been a fundamental element of warfare since the

Founding. *See Legal Authorities* at 14-17. Therefore, the Force Resolution, as construed by the Supreme Court in *Hamdi* and confirmed by history and tradition, authorized the Executive Branch to operate the Terrorist Surveillance Program. *See Hamdi*, 542 U.S. at 518 (plurality opinion) (Force Resolution satisfies statutory bar on detention of American citizens "except pursuant to an Act of Congress"); *id.* at 587 (Thomas, J., dissenting).

That is so notwithstanding the so-called "exclusive means" provision in section 201(b) of FISA, 18 U.S.C. § 2511(2)(f). The Force Resolution is a "statute" authorizing the conduct of "electronic surveillance" under 50 U.S.C. § 1809(a)(1). *See Legal Authorities* at 10-27. Assuming solely for the purposes of this hearing that the Terrorist Surveillance Program involved "electronic surveillance" as that term is narrowly defined in FISA, the exclusive means provision of FISA did not prohibit the Terrorist Surveillance Program for the reasons carefully stated in greater detail in the Department's *Legal Authorities*. *See id.* at 20-23.

Furthermore, it is well established that the President has constitutional authority to direct the use of electronic surveillance for the purpose of collecting foreign intelligence information without prior judicial approval, even during times of peace. *See, e.g.*, *United States v. Truong Dinh Hung*, 629 F.2d 908, 913-17 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593, 602-06 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418, 425-27 (5th Cir. 1973); *United States v. bin Laden*, 126 F. Supp. 2d 264, 271-77 (S.D.N.Y. 2000). Accordingly, the Foreign Intelligence Surveillance Court of Review, the very court Congress established to hear appeals from decisions of the FISC, noted that "all the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information." *In re Sealed Case*, 310 F.3d 717, 742 (2002). The Court of Review, therefore, "took for granted that the President does have that constitutional authority." *Id.*

The conclusion that the President has constitutional authority to conduct electronic surveillance without prior judicial approval is even stronger when undertaken to prevent further attacks against and within the United States, *see, e.g.*, *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."); *Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (noting that "the *Prize Cases* . . . stand for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization") (Silberman, J., concurring), and it is stronger still in the context of an ongoing congressionally authorized armed conflict, *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); *Legal Authorities* at 11. Indeed, in the Force Resolution itself, Congress expressly recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Force Resolution pmbl.

At a minimum, interpreting FISA to prohibit the President from authorizing foreign intelligence surveillance against a diffuse network of foreign terrorist enemies—who already have successfully attacked the United States and who repeatedly have avowed their intention to do so again—without prior judicial approval from the FISC would raise a serious question about the constitutionality of FISA. *See Legal Authorities* at 28-35. FISA must be interpreted, "if fairly possible," to avoid raising these constitutional concerns. *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citations omitted); *see* William N. Eskridge, Jr., DYNAMIC STATUTORY INTERPRETATION 325 (1994) (describing "[s]uper-strong rule against congressional interference with the President's authority over foreign affairs and national security."). As we have explained, FISA is

best interpreted as allowing the Force Resolution to authorize electronic surveillance outside FISA's express procedures. This interpretation is more than "fairly possible."

Justice Jackson explained more than 50 years ago that separation of powers questions—at least those that actually arise in the real world—rarely admit of simple and unambiguous answers. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring). Nevertheless, we believe that even if interpreting FISA to allow the Force Resolution to authorize the Program were not "fairly possible," the Program was a lawful exercise of the President's authority under Article II of the Constitution. The Constitution establishes a zone of constitutional authority for the President to direct the exercise of military force against declared foreign enemies. *See Legal Authorities* at 9-10, 30-34. That power includes the authority to direct the collection of signals intelligence from our enemies in order to detect and prevent further attacks against the Nation. *See id.* at 14-17. Acting pursuant to that authority, the President determined that the Terrorist Surveillance Program was necessary to defend the United States against a subsequent catastrophic terrorist attack. *Id.* at 4-5.

A statute, such as FISA, cannot unduly restrict the President's constitutional authority as Commander in Chief to direct the collection of signals intelligence from the Nation's enemies during an ongoing armed conflict. The Supreme Court stated clearly in *Hamdan v. Rumsfeld* that "Congress [cannot intrude] upon the proper authority of the President . . . . Congress cannot direct the conduct of campaigns . . . ." 126 S. Ct. 2749, 2773 (2006) (quoting *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 139-40 (1866) (Chase, C.J., concurring in judgment)); *see Legal Authorities* at 10 (the President "has certain powers and duties with which Congress cannot interfere") (quoting *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 61 (1941) (Attorney General Robert

H. Jackson)); *see also, e.g., Morrison v. Olson*, 487 U.S. 654, 691 (1988) (Congress may not "impede the President's ability to perform his constitutional duty").

In any event, the Terrorist Surveillance Program has not been reauthorized for several months, and any electronic surveillance that was occurring as part of the Program is now subject to the approval of the FISC. It is now imperative that Congress and the Executive Branch shift their focus away from former intelligence programs and cooperate to close critical gaps in our intelligence capabilities under FISA while ensuring proper protections for the civil liberties of U.S. persons.

FISA has been and continues to serve as the foundation for conducting electronic surveillance of foreign powers and agents of foreign powers in the United States. Although FISA is extremely important, it can and must be improved. The most serious problems with the statute stem from the fact that Congress defined the term "electronic surveillance" in a way that depends upon communications technology and practices as they existed in 1978. In 1978, almost all local calls were carried by wire and almost all transoceanic communications into and out of the United States were radio communications carried by satellite. Congress intentionally kept the latter category of communications largely outside the scope of FISA's coverage, consistent with FISA's primary focus of protecting the privacy of U.S. persons in the United States. Congress used the technological means by which communications were transmitted *at that time* as a proxy for the types and locations of targets to which the procedures and safeguards of FISA would apply.

This technology-dependent approach has had dramatic but unintended consequences, sweeping within the scope of FISA a wide range of communications intelligence activities that Congress intended to exclude from the scope of FISA. Since 1978, we have seen a fundamental transformation in the means by which we

communicate. Congress did not anticipate—nor could it have foreseen—the technological revolution that would bring us global high-speed fiber-optic networks, wireless networks, and the Internet. Sheer fortuity in the development and deployment of new communications technologies, rather than a considered judgment by Congress, has resulted in a considerable expansion of the reach of FISA to involve the FISC in approving the conduct of electronic surveillance of foreign persons overseas.

This unintended expansion of FISA's scope has hampered our intelligence capabilities and has caused the Intelligence Community, the Department of Justice, and the FISC to expend precious resources obtaining court approval to conduct intelligence activities directed at foreign persons overseas. The Director of National Intelligence, J. Michael McConnell, testified just last month that due to the outdated structure governing foreign intelligence surveillance, "[w]e are actually missing a significant portion of what we should be getting" from our enemies. Furthermore, resources that could be spent to protect the privacy of U.S. persons in the United States must be diverted to address applications for surveillance of foreign persons located overseas.

To rectify these problems, the Administration has proposed comprehensive amendments to FISA that would make the statute technology neutral, enhance the Government's authority to secure assistance from private entities in conducting lawful foreign intelligence surveillance activities, and streamline the application and approval process before the FISC. The Administration's proposal would revise the definition of "electronic surveillance," such that FISA's scope would turn upon the subject of the surveillance and the subject's location (inside the United States or abroad), rather than substantively irrelevant criteria, such as the means by which a communication is transmitted or the location where the Government intercepts the communication. A technology-neutral statute would prevent the unintended expansion of FISA and would

provide an enduring and stable framework for the Intelligence Community to conduct foreign intelligence surveillance activities notwithstanding future revolutions in telecommunications technologies.

Privacy and security are not mutually exclusive: By modernizing FISA, we can both provide the Intelligence Community with an enduring, agile, and efficient means of collecting critical foreign intelligence information and strengthen the privacy protections for U.S. persons in the United States. Reinstating FISA's original carve-out for certain foreign intelligence activities conducted against foreign persons overseas would provide the Intelligence Community with the speed and agility necessary to detect and prevent terrorist attacks mounted by a diffuse and flexible network of foreign terrorist organizations. In combination with other proposed amendments to FISA, redefining "electronic surveillance" also would help to restore the focus of FISA on protecting the privacy of U.S. persons in the United States. And it would enable the FISC and the Executive Branch to allocate scarce resources to those applications for the conduct of electronic surveillance that directly implicate the core concern of FISA: protecting the privacy of U.S. persons in the United States.

* * *

Again, Mr. Chairman, thank you for the opportunity to appear today to discuss these important issues. Given the determined and deadly adversary that we continue to face, it is important that Congress and the Executive Branch cooperate to protect the Nation from further terrorist attacks while preserving the civil liberties of all Americans. We look forward to working with Congress to meet those objectives.

# # #

Mr. NADLER. Thank you very much.
Mr. Fein?

TESTIMONY OF BRUCE FEIN, THE LICHFIELD GROUP, INC.

Mr. FEIN. Mr. Chairman and Members of the Subcommittee, I would like to underscore what I think are the most alarming elements of the Terrorist Surveillance Program that ought to concern the Subcommittee and the American people.

First, I would like to address the issue of secrecy. If it were not for a leak to the New York Times and publication in December of 2005, we probably would not have this hearing at present. There have also been indications from statements of the attorney general and others that there are secret surveillance programs that have been undisclosed to Congress as well. There is no ability to hold anyone accountable to a program that is unknown.

Secrecy is the bane of democracy. As James Madison said, "Popular government without popular information is a tragedy, a farce, or both." That seems to me a critical element of this Committee's obligation is to know what in fact is transpiring, so an evaluation, certainly under the fourth amendment, can be made of its constitutionality.

Secondly, the alarming statement of the Administration that FISA is unconstitutional, that article II trumps any ability of this Committee to place any restriction whatsoever on his ability to gather foreign intelligence is quite frightening. The Administration has been unable to dispute that their theory of article II would enable the President to break and enter homes, open mails, commit assassinations, do anything that he thinks is necessary to gather foreign intelligence no matter what restrictions this Committee has placed to honor and vindicate other constitutional values.

It is true that the President has insisted he has not utilized his article II powers to the maximum extent possible, but he has certainly set a precedent that will lie around like a loaded weapon ready to be used the next time we have 9/11. I would like to recall a certain vignette from our own history. In 1765, the British Parliament enacted the Stamp Act, and that represented taxation without representation, and much furor and opposition.

Later on when the Stamp Act was repealed, the Parliament nevertheless asserted in the Declaratory Act that Parliament would retain the power, although it eliminated the tariffs, with authority to tax without representation, and that was what sparked the American Revolution. Simply the fact that we have a President who says, I will not use my article II authority to break and enter your home without a warrant, should not be much comfort.

I would like also to address the insinuation that FISA somehow crippled the President's ability to gather foreign intelligence, which is a canard of the highest order. Ninety-nine percent of foreign intelligence gathered by the National Security Agency is outside of FISA because it targets an alien abroad. There is no reasonable expectation of privacy that Osama bin Laden has in a cave in Afghanistan that we will not spy on him. And FISA has no application in those circumstances.

The kinds of issues that we are addressing with the Administration's Terrorist Surveillance Program is when an American citizen

on American soil is targeted for surveillance. There, it said we still can't get a warrant. We have to utilize the President's judgment alone as to whether or not there ought to be surveillance.

Now, there is, however, one fix in the FISA program that does deserve correction, and I think Mr. Bradbury alluded to that. There is a definition of "electronic surveillance" that includes any communication that makes a route through the domestic communications systems of the United States. That doesn't make any sense. The concern needs to be on the protection of privacy, reasonable expectations of privacy. Of course, that fix could have been made 5 years ago, right after 9/11, by simply changing the definition of "electronic surveillance" to exclude communications that simply happen by happenstance to have a domestic routing to it.

Let me go back to the reason why we ought to be concerned about violations of FISA. As Justice Louis Brandeis said, "the right to be left alone is the most cherished right among civilized people." When the citizenry understands that the President, on his authority alone, can spy on anyone, can leak information out that is derogatory or otherwise to punish dissidents or opposition to the incumbent leaders, there becomes a feeling of cowardliness, intimidation that silences and reduces the robustness of dialogue that is important to a democratic discourse.

Moreover, it makes people feel anxious about being unorthodox. It reduces spontaneity. It inhibits much of what we cherish in the United States of America, the signature that the purpose and chief aim of Government is to make us free. That exception requires important Government interests to be asserted and proven before we limit that freedom.

That is why, in my judgment, it is so important that we be very scrupulous in recognizing any exceptions to the ability of Congress to regulate the gathering of foreign intelligence or other intelligence information, and insist certainly that the fourth amendment be honored.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Fein follows:]

PREPARED STATEMENT OF BRUCE FEIN

Dear Mr. Chairman and Members of the Committee:

I am pleased to share my views on the legality of the Bush administration's programs to gather foreign intelligence in contravention of the Foreign Intelligence Surveillance Act of 1978 (FISA). My remarks will focus on the National Security Agency's (NSA) domestic warrantless surveillance program that targets American citizens on American soil on the President's say-so alone. But Delphic remarks by the Attorney General and other Bush administration officials indicate that other foreign intelligence spying programs are ongoing and generally unknown by either the Congress or the American people. But the Founding Fathers decried secret government. They recognized that sunshine is the best disinfectant; and, that secrecy breeds abuses and folly. Think of the three decades of illegalities by the Central Intelligence Agency and Federal Bureau of Investigation in opening mail and intercepting international telegraphs revealed by the Church Committee. Accordingly, Congress should insist that the respective intelligence committees of the House and Senate be fully and currently informed of every foreign intelligence collection program of the executive branch.

WHY BE ALARMED ABOUT ILLEGAL SPYING PROGRAMS?

The signature idea of the American Revolution was the belief that the chief end of the state was to make persons free to develop their faculties and to pursue virtue and wisdom, not to aggrandize government or to build empires. The Founding Fa-

thers believed that liberty should be the rule and that government intervention the exception based on a serious showing of need to protect a strong collective interest. They believed that the right to be left alone was the most cherished by civilized people; and, that a generalized fear of government harassment or retaliation would dull political debate and deter dissent. Accordingly, the Fourth Amendment was enshrined to prohibit government from unreasonable searches and seizures. The primary safeguard was the customary requirement of a particularized judicial warrant for a search premised on probable cause to believe evidence of crime would be discovered. History had taught that an unchecked executive would search to cow, to harass, or to oppress political opponents. The Fourth Amendment safeguards the right to be left alone for its own sake and to promote robust political discourse, the lifeblood of a democratic dispensation.

Illegal searches are alarming because they subvert a fundamental individual liberty and frighten the public into submissiveness or silence. An indefinite number of citizens today are hesitant to criticize the Bush administration because fearful of retaliation.

THE ILLEGALITY OF THE NSA'S DOMESTIC WARRANTLESS SURVEILLANCE PROGRAM

I have attached an article I authored for the Presidential Quarterly that elaborates on the flagrant illegality of the NSA's domestic warrantless surveillance program that violates FISA; and, an article I authored for The Washington Times that examines former Deputy Attorney General James Comey's testimony before the Senate Judiciary Committee last week. The gist of the articles is as follows:

- FISA is clearly a constitutional exercise of the congressional power to enact necessary and proper laws that reasonably regulate the exercise of an executive power;
- FISA leaves the vast majority of the executive's power to gather foreign intelligence undisturbed, and does not aggrandize Congress at the expense of the executive;
- FISA was born of decades of spying abuses by an unchecked executive to harass or embarrass political opponents. It was not an exercise of congressional peevishness.
- The constitutional theory advanced by the Bush administration to justify the NSA's warrantless spying program equally crowns the President with authority to open mail, break and enter homes, and kidnap for the purpose of interrogation on his say-so alone.
- Mr. Comey did not fix the FISA problem with the NSA's warrantless surveillance program after he threatened to resign and President Bush informed him to do the right thing.
- Congress should enact a law that prohibits any expenditure of the United States to gather foreign intelligence except in conformity with FISA.

Based on the public record, it also would seem appropriate for this Committee to investigate whether criminal violations of FISA have been committed by the Bush administration and to urge the Department of Justice to appoint a special prosecutor to examine the matter. There is reason to suspect that high level officials, including President Bush himself, have knowingly violated FISA and continue to do so through the NSA's domestic warrantless surveillance program. All of the legal arguments concocted by the Bush administration to defend the program have been facially preposterous.

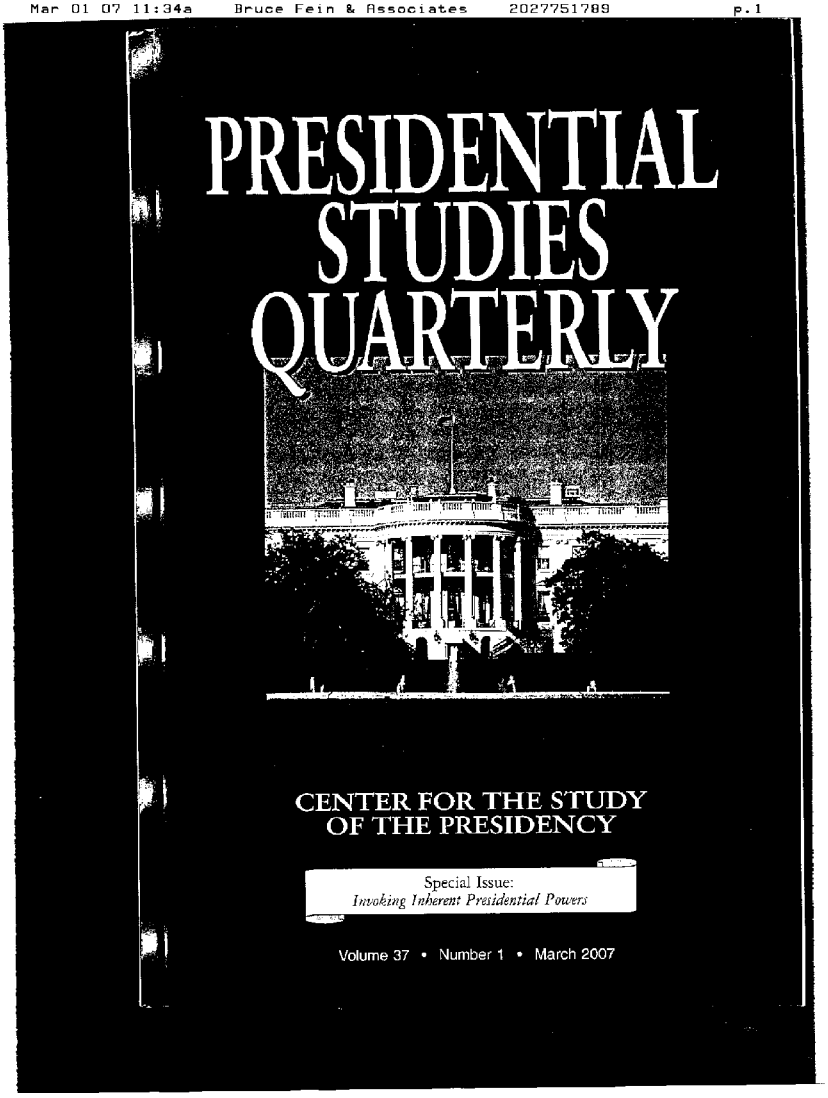
Attorney General Alberto Gonzales belatedly obtained a FISA warrant for the NSA's spying but its terms have not been shared with Congress generally. Without disclosure, it is impossible for Congress to assess whether the warrant complies with FISA or whether the statute should be amended. I would urge Congress to prohibit the expenditure of any monies of the United States to execute a FISA warrant whose provisions have been withheld from the its respective House and Senate intelligence and judiciary committees despite the issuance and service of proper subpoenas.

CONCLUSION

If Congress leaves the Bush administration's illegal spying programs unrebuked, a precedent will have been established that will lie around like a loaded weapon ready for permanent use throughout the endless conflict with international terrorism. If Congress slumbers, free speech and association will be chilled; political dissent will be muffled; unorthodox or unconventional behavior will be discouraged or punished; and, the American people will become docile, a fatal weakness to demo-

cratic customs and institutions. If the constitutional oath means anything, it means that Members of Congress are obligated to check and to sanction clear and palpable executive branch abuses.

ATTACHMENTS



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PRESIDENTIAL STUDIES QUARTERLY

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Presidential Authority to Gather Foreign Intelligence

BRUCE FEIN
Bruce Fein & Associates and The Litchfield Group

President George W. Bush has claimed inherent constitutional authority to collect foreign intelligence on his say-so alone in contravention of the warrant requirements stipulated in the Foreign Intelligence Surveillance Act of 1978 (FISA), as amended six times since 9/11. The constitutionality of FISA, however, is incontestable. It is justified by the Necessary and Proper Clause of Article I, section 8, clause 18 in light of the massive foreign intelligence abuses compiled during forty years of absolute executive power. FISA leaves the separation of powers undisturbed. It regulates only a microscopic percentage of foreign intelligence collection. To sustain President Bush's constitutional claims would "trust me" the measure of our civil liberties, not the checks and balances intended by the Constitution's architects.

President George W. Bush has claimed inherent constitutional power to target American citizens on American soil for warrantless electronic surveillance or physical searches by the National Security Agency (NSA) in defiance of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 et seq. (FISA). The statute has been amended six times since 9/11 to accommodate the heightened danger and new stratagems for communicating without detection.[1] Why has President Bush's nonsense on stilts garnered nontrivial homage?

Conflict summons fear.

Fear breeds imbalanced judgments.

Imbalanced judgments manufacture constitutional interpretations from trifles light as air to exploit and to placate exaggerated popular alarm.

9/11 fits the historical pattern. The aftermath of that abomination resembles Pearl Harbor, one of its most execrable ancestors. Five months elapsed after the Japanese attack

1. 50 U.S.C. § 1801 et seq.

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with no evidence of internal disloyalty or sabotage in the United States by citizens or permanent resident aliens sporting Japanese ancestry. Yet 120,000 were interned until the closing months of World War II, a duration that was extended to avoid antagonizing bigoted voters in the November 1944 elections. The professed justification was national security. The genuine reason was racism, as Congress found in the Civil Liberties Act of 1988.[2]

President Bush has chosen to flout FISA for more than five years with no evidence that its mild restraints on foreign intelligence collection impair the defeat of international terrorism. His motivations have been fivefold: to gather political intelligence against his domestic critics, to chill dissent by creating an aura of intimidation, to cripple Congress as a check on presidential power, to warn courts against second-guessing national security decisions of the commander in chief, and to concoct an appearance of toughness on terrorism.

FISA did not facilitate the success of the 9/11 hijackers. The 9/11 Commission did not find that the hijackings would have been averted if the president had enjoyed unchecked power to spy. On July 31, 2002, the Bush administration testified to the Senate Intelligence Committee that FISA was nimble, flexible, and impeccable as an instrument for nipping terrorist plots in the bud.[3]

The NSA's circumvention of FISA has yielded no demonstrable national security benefits. President Bush has not identified even one terrorist attack that was frustrated by warrantless spying on American citizens. In contrast, the White House has described in some detail the terrorism that was allegedly frustrated by the CIA's secret imprisonments and interrogations of the "Al Qaeda 14." In signing the Military Commissions Act of 2006, President Bush elaborated: "The CIA program helped us identify terrorists who were sent to case targets inside the United States, including financial buildings in major cities on the East Coast. And the CIA program helped us stop the planned strike on U.S. Marines in Djibouti, a planned attack on the U.S. consulate in Karachi, and a plot to hijack airplanes and fly them into Heathrow Airport and Canary Wharf in London."[4] Bush has conspicuously remained as silent as the Sphinx about the NSA's warrantless surveillance success stories because there are none to tell. If there were, they would have been leaked and declassified long ago.

Pearl Harbor and 9/11 have in common the cynical assertions of power to advance a partisan political agenda at the expense of the Constitution and the rule of law. To borrow from Madam Roland about the French Revolution: "O National Security! O National Security! What crimes are committed in thy name!"

Congressional Power to Enact FISA

There may be statutes with even more solid constitutional foundations than FISA, but if there are, they do not readily come to mind.

2. Public Law 100-383; 50 U.S.C. App. 1989 (b-3(e)).

3. 50 U.S.C. §§ 1801-1811 and 1821-1829.

4. "President Bush Signs Military Commissions Act of 2006." Available from http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html.

Article I, section 8, clause 18 empowers Congress "to make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof" (Necessary and Proper Clause). Chief Justice John Marshall, in *McCulloch v. Maryland*, 17 U.S. 316 (1819), explained the breadth of authority it confers:

> A constitution, to contain an accurate detail of the subdivisions of which its great powers will admit, and of all the means by which they shall be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. . . . [W]e must never forget that it is a *constitution* we are expounding. . . . [The Necessary and Proper Clause] is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* in human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can best be provided for as they occur. To have declared, that the best means shall not be used, but those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise reason, and to accommodate its legislation to circumstances. . . . [W]e think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. (emphasis added)

It may be conceded that Article II of the Constitution vests in the president authority to gather foreign intelligence, that is, intelligence useful to the foreign policy or national security of the United States. FISA, nevertheless, is a "necessary and proper" law regulating the execution of that authority. Its legitimate goals are to fortify the Fourth Amendment's protection of privacy and the First Amendment's protection of free speech and association. Both were chronically abused during forty years of unchecked executive power over intelligence collection. The Constitution did not require Congress to blind itself to this experience. Absolute power corrupts absolutely in all times and places. Human nature does not change.

U.S. Circuit Judge Richard A. Posner has written: "FISA was a legislative reaction (indeed overreaction) to executive branch abuses" (Posner 2006, 149). But he insists that a changed cultural environment more adulatory of civil liberties has antiquated the statute: "The point is not that human nature has changed, since the days when J. Edgar Hoover ran roughshod over civil liberties; it hasn't. It's the environment in which law enforcement and intelligence personnel work that has changed reducing the risk of abuse of private information by its governmental custodians at the same time that the menace of terrorism has increased" (ibid., 145). Posner adds: "Although there is a history of

misuse by the FBI, the CIA, and local police forces of personal information collected ostensibly for law enforcement and intelligence purposes, it is not a recent history. The legal and bureaucratic controls over such misuse are much tighter today than they used to be" (ibid., 144). The judge's argument is unconvincing.

As chronicled hereafter, intelligence abuses are frequently orchestrated by the president or his political appointees, not by trained bureaucrats. Ambassador Joseph Wilson and Valery Plame, for example, were defamed through intelligence leaks from President Bush's inner circle, including Vice President Dick Cheney, his Chief of Staff Scooter Libby, and Karl Rove, President Bush's Rasputin. Further, the incentives for law enforcement and intelligence personnel since 9/11 is to spy more and pay less heed to civil liberties under the patriotic marquee, "No more 9/11's." Even before that infamous date, Wen Ho Lee's life had been ruined by government leaks falsely identifying him as a Chinese Communist spy. Ditto for Stephen Hatfill, a so-called person of interest in the FBI anthrax villain investigation. On November 3, 2006, the *New York Times* reported that FBI Director Robert S. Mueller had issued a stern message to the bureau's thirty thousand employees against leaking confidential information after recent news articles disclosed criminal investigations involving congressional incumbents, especially House Republicans. The leaks could have affected the Democratic capture of the 110th Congress.

The state secrets doctrine protects wrongdoers who abuse foreign intelligence from civil liability. And criminal liability will be averted or absolved by presidential pardons or retroactive immunity enacted by Congress. Think of President Ronald Reagan's pardons of Ed Miller and Mark Felt for illegal burglaries, President George H. W. Bush's pardons of Elliot Abrams and Caspar Weinberger for Iran-Contra deceptions, and President Bill Clinton's pardon of CIA Director John Deutsch for his mishandling of classified information. The Military Commissions Act also exonerated violations of the War Crimes Act of 1987. The Civil Liberties Board created by the Patriot Act is a nonfunctioning joke.

Posner also undercuts his own "changed environment" thesis by proposing a qualified "good faith" immunity defense to shield national security officials who violate a constitutional right (ibid., 155). But the defense would be unnecessary if officials were scrupulous in obeying the law.

Finally, the FBI's and CIA's intelligence wrongdoings receded from their historical high watermark because of statutes like FISA. That understanding is a reason for retaining the laws, not for their relaxation.

A special committee of the U.S. Senate dubbed the "Church committee" held lengthy and televised hearings beginning in 1975.[5] The Church committee was complemented by a less responsible and professional committee in the House of Representatives styled the "Pike committee."[6] Both committees surveyed forty years of unchecked executive spying for intelligence purposes from President Franklin D. Roosevelt through President Richard M. Nixon. The examination revealed decades of illegal mail openings, decades of illegal interceptions of international telegrams, a history of illegal burglaries,

5. Hearings before the Select Committee to Study Government Operations with Respect to Intelligence Activities of the U.S. Senate, 94th Cong., 1st sess., vol. 4, Mail Opening, October 21-24, 1975.

6. *Congressional Record*, 94th Cong., 2d sess. (January 29, 1976).

misuse of the NSA for non-foreign intelligence purposes, spying to gather political intelligence and embarrassing personal information on political opponents and dossiers on political dissenters.

The FBI's investigation of the leak to the *New York Times* of President Nixon's secret bombing of Cambodia in 1970 was emblematic (Gentry 1991, 632). It began with wiretaps on Morton Halperin, an aide to National Security Adviser Henry Kissinger. It expanded to persons whom Kissinger suspected were undermining his White House influence. Two months of wiretaps and bugs yielded nothing, but Kissinger insisted on their continuance to enable the suspects to establish a "pattern of innocence," a concept worthy of Franz Kafka's *The Trial*.

Identifying the leaker soon degenerated into collecting political intelligence, for example, a planned magazine article by Clark Clifford critical of Nixon's Vietnam War policy. In all, the FBI employed technical means against seventeen individuals. The information retained concerned sex lives, drug use, drinking habits, mental problems, marital disputes, vacation plans, and social contacts.

FISA was a "necessary and proper" answer to this long train of presidential spying abuses. It requires the attorney general to obtain a warrant from a FISA judge to conduct electronic surveillance or physical searches that target American citizens on American soil for foreign intelligence purposes. An application must demonstrate probable cause to believe the American target is implicated in international terrorism or is otherwise acting as an agent of a foreign power. That threshold is not difficult to satisfy. Since the inception of FISA, approximately twenty thousand warrant applications have been granted.[7] A handful have been denied.

FISA accommodates the special needs of emergencies or wartime. It authorizes electronic surveillance or physical searches in such circumstances without a warrant for seventy-two hours[8] and fifteen days,[9] respectively.

Probably 99 percent or more of foreign intelligence is gathered outside the constraints of FISA. As the NSA has testified, its targets are typically aliens abroad, who enjoy neither Fourth Amendment nor FISA protection.[10] In other words, FISA regulates but a tiny crumb of foreign intelligence collection. Even in that domain, the statute is not unworkable, as the Department of Justice has testified after 9/11. Moreover, the NSA's warrantless surveillance program excludes domestic-to-domestic communications, which remain governed by FISA.[11] The latter statute is circumvented only where one communicant is abroad. But FISA's warrant rules are identical in both situations. If warrants are workable for domestic-to-domestic interceptions, the same is true for domestic-to-foreign communications.

7. Statement of Senator Patrick Leahy, Chairman, Senate Judiciary Committee, "Wartime Executive Power and the NSA's Surveillance Authority," February 6, 2006. Available from http://leahy.senate.gov/press/200602/020606.html.

8. 50 U.S.C. § 1802.

9. 50 U.S.C. § 1011.

10. H.R. 5825, "Electronic Surveillance Modernization Act."

11. Testimony to the Judiciary Committee of the U.S. Senate by General Michael V. Hayden, Director, CIA, July 26, 2006.

The Bush administration sophomorically contends that FISA unconstitutionally encroaches on executive power. James Madison explained in *Federalist no. 47* that the Constitution's separation of powers is violated only when one branch exercises a decisive or predominating influence over a power assigned to another. FISA's regulation of the president's foreign intelligence authority, however, is narrow and measured. It was born not of flagrant and persistent presidential spying violations of the First and Fourth Amendments. In addition, the statute does not aggrandize Congress at the expense of the White House, but simply subjects foreign intelligence surveillances and physical searches to independent judicial scrutiny. If FISA falls short of the "necessary and proper" benchmark, then the clause is meaningless, and *McCulloch* has been de facto overruled.

9/11 neither diminished FISA's constitutional standing nor required rethinking its application to a world beset by terrorism. Al Qaeda is but a shadow of the Soviet Union as it then stood when FISA was enacted in 1978. The Soviet invasion of Afghanistan was but one year away. The Cuban missile crisis was in recent memory. The USSR brandished thousands of nuclear warheads and delivery vehicles, MIRVs, submarines, long-range bombers, and a formidable Red Army. It enjoyed a vast industrial base, oil supplies, and sister resources to support a prolonged hot war. The USSR also sported first-rate scientists capable of developing sophisticated chemical and biological weapons. The United States' need for instant and reliable foreign intelligence to thwart a nuclear attack by the Soviet Union was of the highest order. If FISA did not handcuff the president in meeting the Soviet danger, a fortiori, the statute does not encumber the president in foiling Al Qaeda's loathsome aims.

To be sure, technologies for communicating have advanced since 1978. But Congress has amended FISA six times since 9/11 to insure against technological obsolescence.

Historical uses of the power of the purse to curb the president's war powers as commander in chief have been far more intrusive than FISA constraints in foreign intelligence collection. (The power of the purse is subject to constitutional limits. It is not invincible, as in *United States v. Lovett*, 328 U.S. 303 [1946], where the Supreme Court invalidated an appropriations measure as an unconstitutional bill of attainder.) As part of a strategy to force President Nixon to scale back or end the U.S. military presence in Indochina, Congress enacted four major appropriations measures. In late December 1970, Congress passed the Supplemental Foreign Assistance Appropriations Act. It prohibited the use of funds to introduce U.S. ground combat troops into Cambodia or to provide U.S. advisors to or for Cambodian military forces in Cambodia.

In late June 1973, Congress approved the second Supplemental Appropriations Act for FY1973. It declared: "None of the funds herein appropriated under this act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam, and South Vietnam by United States forces, and after August 15, 1973, no other funds heretofore appropriated under any other act may be expended for such purpose."

That prohibition was carried forth in the June 30, 1973 Continuing Appropriations Resolution for FY1974. In December 1974, Congress passed the Foreign Assistance Act of 1974, which capped American personnel in Vietnam at 4,000 within six months of enactment and 3,000 after one year.

In late September 1994, Congress passed the Department of Defense Appropriations Act for FY1995. It stipulated: "None of the funds appropriated by this Act may be used for the continuous presence in Somalia of United States military personnel after September 30, 1994." Congress similarly decreed through Title IX of the Department of Defense Appropriations Act for FY1995 that "no funds provided in this Act are available for United States military participation to continue Operation Support Hope in or around Rwanda after October 7, 1994, except for any action that is necessary to protect the lives of United States citizens."

Both Attorney General Alberto Gonzales in testimony before the Senate Judiciary Committee and former Deputy Assistant Attorney General John Yoo in his book *War by Other Means* have affirmed that Congress could constitutionally terminate the NSA's warrantless surveillance program through the power of the purse (Yoo 2006, 125). The text of such a statute would provide: "No funds of the United States may be expended to gather foreign intelligence except pursuant to the Foreign Intelligence Surveillance Act." The encroachment on the president's foreign intelligence authority is the same whether effectuated through the power of the purse or through FISA. An encroachment by any other name is still an encroachment. To argue, as do Attorney General Gonzales and former Deputy Assistant Attorney General Yoo, that the Constitution makes a distinction between the two is to exalt form over substance.

Constitutional Philosophy

President Bush's claim of supreme authority to gather foreign intelligence contrary to FISA also wars with the constitutional philosophy of the Founding Fathers. They understood that men were not angels, that human nature and the corrupting influence of absolute power do not change, that "trust me" was no substitute for making ambition to counteract ambition, and that a separation of powers was essential to avoiding tyranny. Not a single word in either the Constitution or the *Federalist Papers* indicates that, in contemplating necessary restraints on the three branches of government, proper deductions should be made for the ordinary depravity of human nature, except for the executive branch. Indeed, the Founders were further especially fearful of executive abuses or megalomania. The Declaration of Independence indicted King George III, not the British Parliament: "The History of the present King of Great Britain is a History of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States." The congressional power of the purse, the president's obligation to take care that the laws be faithfully executed, and the Fourth Amendment's prohibition of unreasonable searches and seizures responded to the excesses of King Charles I, King James II, and King George III, respectively.

It is inconceivable that the Constitution's makers would have frowned on FISA's narrow and modest regulation of the president's authority to spy on American citizens on American soil under the banner of foreign intelligence. To paraphrase Chief Justice Marshall, the Necessary and Proper Clause aimed to enable Congress to avail itself of

experience. Forty years of flagrant illegalities in violation of the Fourth and First Amendment rights of U.S. citizens occasioned by unchecked presidential power was enough.

The Founding Fathers, nevertheless, understood that situations could arise when a president might find it necessary to flout the law to rescue the nation from peril. They were versed in John Locke's *Second Treatise of Civil Government*, which addressed the matter in explaining executive prerogative. The gist of Locke was that laws might be violated by the executive to preserve society, but at the risk of repudiation or overthrow by the people or legislature. Their approvals were necessary to make what was illegal legal.

Following Locke and the Founding Fathers, if President Bush thought it necessary to violate FISA in the wake of 9/11, he should have informed Congress and the people of his transgression and pleaded for statutory ratification of his actions, just as President Abraham Lincoln did after unilaterally suspending the Great Writ of habeas corpus in the Civil War.[12]

In seeming anticipation of 9/11, Locke elaborated:

> Many things there are, which the law can by no means provide for; and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require: nay, it is fit that the laws themselves should in some cases give way to executive power, or rather to this fundamental law of nature and government, viz. That as much as may be, all members are to be preserved. . . . This power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, is that which is called prerogative: for since in some governments the lawmaking power is not always in being, and is usually too numerous and too slow, for the dispatch requisite to execution. . . . This power, whilst employed for the benefit of the community, and suitability to the trust and ends of government, is undoubted prerogative, and never is questioned: for the people are very seldom or never scrupulous or nice in the point; they are far from examining prerogative, whilst it is in any tolerable degree employed for the use it was meant . . . but if there comes to be a question between the executive power and the people, about a thing claimed as a prerogative; the tendency of the exercise of such prerogative to the good or hurt of the people, will easily decide the question. . . . And therefore they have a very wrong notion of government, who say, that the people have encroached upon the prerogative, when they have got any part of it to be defined by positive law: for in so doing they have not pulled from the prince any thing that of right belonged to him, but only declared, that that power which they indefinitely left in his or his ancestors hands, to be exercised for their good, was not a thing which they intended him when he used it otherwise. (1690, §§ 161-63)

Controlling Supreme Court Decisions

The Supreme Court's decision in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952), further fortifies the constitutionality of FISA. There Congress rejected an amendment to the 1947 Taft-Hartley Act that would have authorized the president to seize private businesses to resolve labor disputes. Five years later, in the midst of the Korean War, President Harry Truman seized private steel mills to avert a threatened

12. "Habeas Corpus Act of 1863," United States Statutes at Large, vol. 12, 37th Cong., 3d sess., 755-58.

strike that could have upset the supply of steel used in weapons manufacture. The Supreme Court rebuked the president's claim of inherent constitutional power as commander in chief to justify a seizure that Congress had declined to authorize. Writing for the majority, Justice Hugo Black amplified: "It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes." But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution "in the Government of the United States, or any Department or Officer thereof."

Four features of *Youngstown* deserve emphasis. First, Congress did not find that there had been presidential abuses of the power to seize private businesses for partisan political purposes. Second, the congressional prohibition on seizures was absolute. There were no exceptions or alternatives. Third, Congress had not affirmatively declared that the president enjoyed no seizure power, but simply failed to authorize the same, a less vigorous expression of legislative sentiment. Fourth, the president's seizure of a private business violated the constitutional injunction against the taking of property without just compensation. The right to operate a private business enterprise is less central to a democratic dispensation than the Fourth or First Amendments, which safeguard rights most cherished by civilized peoples.

FISA is a much easier case than *Youngstown*. Congress was provoked to act by decades of widespread presidential abuses. In addition, the statute does not prohibit the president's collection of foreign intelligence through electronic surveillance or physical searches of American citizens, but simply lightly regulates the techniques by requiring a FISA warrant. Moreover, FISA leaves completely undisturbed the collection of 99 percent or more of foreign intelligence, which is derived from targeting aliens located abroad. And unlike the Taft-Hartley Act on presidential seizures, FISA explicitly declares that gathering foreign intelligence on Americans in contravention of FISA is criminal, the highest octave of legislative intent to restrain the executive. Finally, FISA protects against violations of the Fourth and First Amendments, which stand atop the Constitution's hierarchy of values.

Youngstown is not distinguishable from FISA on the theory that the former involved nonbattlefield actions in the domestic arena whereas the latter regulates battlefield intelligence. FISA leaves the president uncircumscribed in targeting aliens or Americans abroad for electronic surveillance or physical searches, whether in Afghanistan, Iraq, Indonesia, or otherwise. It is confined to Americans on American soil and who command a reasonable expectation of privacy within the Fourth Amendment. President Bush has unpersuasively argued that all the world's a battlefield because Al Qaeda is eager to kill Americans at any time in any place. But if that theory were accepted, then the U.S. military could employ rockets or firearms to kill any person in the country suspected of Al Qaeda sympathies without asking questions, such as American citizen Jose Padilla when he landed in Chicago. (Padilla was first detained as a material witness, further detained as an illegal enemy combatant, and then indicted for providing material assistance to an international terrorist organization.) The theory would sound the death knell for the Bill of Rights and the rule of law.

The Supreme Court's decision in *Morrison v. Olson*, 487 U.S. 654 (1988), also discredits the argument that FISA unconstitutionally undermines the president's authority over foreign intelligence. Article II entrusts the president with responsibility for faithfully executing the laws. Criminal law enforcement lies at the core of that authority. Congress may not limit the president's choice of the attorney general to ensure that law enforcement marches to a presidential drummer, according to the rationale of the Supreme Court in *Myers v. United States*, 272 U.S. 52 (1926). Yet in *Morrison*, the Court sustained the Independent Counsel Act, which removed from the president's complete control a certain category of criminal law enforcement.

The act provided for the appointment of an independent counsel by a special three-judge court on the application of the attorney general. An application was required when nontrivial evidence surfaced justifying a criminal investigation of one or more of the president's men or his party's bigwigs. After appointment, an independent counsel could be removed only for "good cause." In sum, an independent counsel encroached on the president's Article II power to enforce the criminal law.

Writing for the Court in *Morrison*, Chief Justice William Rehnquist denied that the "good cause" removal limitation impermissibly interfered with the president's exercise of his constitutionally appointed functions. He reasoned: "There is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that have been typically undertaken by officials within the executive branch." But the independent counsel exercised limited criminal jurisdiction and enjoyed a limited tenure. Accordingly, the chief justice concluded: "Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President." In addition, the independent counsel did not confound the president's duty to faithfully execute the laws because incompetence or misbehavior would justify a "good cause" dismissal. Chief Justice Rehnquist added that "the congressional determination to limit the removal power of the Attorney General was essential, in the view of Congress, to establish the necessary independence of the office [to conduct politically sensitive investigations]. We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws."

The Constitution's separation of powers was undisturbed by the Independent Counsel Act because the principle does not require the three branches of government to operate with absolute independence. While separation of powers does prohibit Congress from preventing the executive branch from accomplishing its constitutionally assigned functions, the independent counsel was subject to sufficient control by the attorney general and the policies of the Department of Justice to ensure that the president was not sidelined in his law enforcement duties.

The *Morrison* rationale clearly sustains FISA against a separation of powers attack. It does not prevent the president from gathering foreign intelligence. Indeed, it regulates less than 1 percent of foreign intelligence activities. Further, the regulation is measured,

not draconian. The president is obligated to obtain a FISA warrant based on probable cause to believe an American target on American soil is a foreign agent before conducting electronic surveillance or physical searches. The threshold for a FISA warrant is undemanding, which explains why virtually every warrant application has been granted. In addition, Congress did not enact FISA to aggrandize its own powers, but to confer on the judiciary a checking function to prevent Fourth and First Amendment abuses by the executive. As *Morrison* expressly holds, the fact that a function has been constitutionally assigned to the executive does not, ipso facto, shield it from congressional regulation under the Necessary and Proper Clause or otherwise.

The Supreme Court's decision in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), is not to the contrary. In upholding a broad delegation of legislative power to the president in the field of foreign affairs, Justice George Sutherland amateurishly ruminated about the primacy of the executive in fashioning the external relations of the United States. He observed (ibid., 320):

> Moreover, he, not Congress, has the opportunity of knowing conditions which prevail in foreign countries, and especially is this true in times of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular, and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

Sutherland's paean to the executive in foreign affairs misleads by omission. Presidents regularly lie to Congress and the American people by misrepresenting foreign intelligence. Falsehoods were told about Spain's responsibility for the explosion on the *USS Maine* to push the nation toward the Spanish-American War. President Franklin Roosevelt lied about a Nazi attack on the *USS Greer* to propel the nation into World War II (Kimball 2004, 83). President Lyndon Johnson lied about the North Vietnamese attacks on the *USS Mattox* and *USS Turner Joy* to justify the Tonkin Gulf Resolution.[13] President George W. Bush lied about Iraq's weapons of mass destruction, including attempts to purchase uranium in Niger, to defend his invasion of Iraq. In sum, Justice Sutherland neglected completely presidential abuses of foreign intelligence, which easily establishes the constitutionality of congressional checks like FISA.

Curtiss-Wright did not canonize the White House as the sole organ of the nation in foreign policy or national security. If it had, the many neutrality acts of Congress in the 1930s would have been unconstitutional.[14] Decided at the zenith of neutrality fever in Congress, *Curtiss-Wright* did not even insinuate a doubt as to the constitutionality of the neutrality laws.

FISA's Chief Critics

FISA's critics, like Attorney General Gonzales and former Deputy Assistant Attorney General Yoo, argue that the Constitution grants the president the leading role in

13. H.R. Res. 1145 (August 7, 1964).
14. 49 Stat. 1081 (1935), 49 Stat. 1153 (1937), 50 Stat. 121 (1937), 54 Stat. 12 (1939).

foreign affairs. Assuming the truth of that proposition, FISA leaves the primacy of the president in gathering foreign intelligence intact. As amplified above, the statute regulates less than 1 percent of foreign intelligence collection, and even in that tiny universe the president is authorized to conduct electronic surveillance or physical searches against American citizens on American soil with a FISA warrant.

The major critics also bemoan that establishing probable cause to obtain a FISA warrant is too difficult. Mr. Yoo complains in his book that Al Qaeda does not advertise its membership or wear pictures of Osama bin Laden on their shirts. He observes: "Our best information about Al Qaeda will be scattered and tough to gather, and our agents need to be able to follow many leads quickly, and to move fast on hunches and educated guesses" (Yoo 2006, 105). He also maintains: "FISA operates within a framework that assumes foreign intelligence agents are relatively simple to detect" (ibid., 104-5).

But Yoo's indictments are misconceived. FISA does not assume that foreign agents are easy to detect. Its probable cause threshold is routinely satisfied, as noted above. What FISA does assume, based on forty years of experience, is that unchecked executive power to gather foreign intelligence as championed by Yoo will degenerate into political spying and rampant violations of the Fourth and First Amendments to harass or to deter political dissent. Yoo naïvely insinuates that President Bush, unlike Nixon and other predecessors, is a saint who would never stoop to spy for partisan objectives. He can be trusted with supreme power. Yoo forgot to interview Ambassador Joseph Wilson and his wife Valery Plame about Bush's saintliness. Indeed, any president who asserts that "trust me" should be the measure of civil liberties in the United States should not be trusted.

Yoo also neglects to remember that virtually all Al Qaeda intelligence is gathered outside of FISA because the NSA's electronic surveillance and physical searches generally target persons in foreign countries. Intelligence experts estimate the number of genuine Al Qaeda members in the United States at one to two dozen. They pose less of a threat to the people of the United States than do the perpetrators of the approximately twenty thousand murders committed annually here.[15] The latter criminals do not make known their antisocial propensities to the world. It is more difficult to establish probable cause to obtain a search or arrest warrant against them than it is to obtain a FISA warrant to spy on a suspected foreign agent. Yet the Constitution does not permit abandonment of the Fourth Amendment to make foiling murder easier. It does not even permit watering down the Fourth Amendment to thwart domestic terrorism a la Timothy McVeigh. There is even less reason for relaxing the amendment's privacy protection in targeting American citizens on American soil for electronic surveillance and physical searches in pursuit of foreign intelligence on international terrorism.

Judge Posner argues: "One reason why people don't much mind having their bodies examined by doctors is that they know that doctors' interest in bodies is professional rather than prurient; we can hope the same is true of intelligence professionals" (Posner 2006, 143). But the hope is naïve. Intelligence is political power. The people who control the use of foreign intelligence are political appointees. Their prime interest in intelli-

15. FBI Uniformed Crime Reporting Program, "Crime in the United States" (1986-2005). Available from http://www.fbi.gov/ucr/05cius/data/table_01.html.

gence is not professional, but in its manipulation to cripple political opposition or dissent. Posner further maintains: "An electronic search no more invades privacy than does a dog trained to sniff out illegal drugs" (ibid., 130). The analogy seems preposterous. The privacy protected by the confidentiality of communications is essential to spontaneity, political dissent, and personal intimacies that are central to a democratic dispensation and a rewarding human existence. If all communications were known to the world, life would become guarded or rehearsed as in the former Soviet Union. A dog sniff for drugs discloses nothing about the mind or ideas of the target. It is highly accurate in identifying contraband, and false positives do not result in anything akin to political intelligence that can be retained indefinitely to intimidate or blackmail. If Posner feels no differently about a dog sniffing his luggage for drugs and the NSA's reading all his e-mails and listening to all his phone calls, he is probably a minority of one.

The nation might be marginally safer from foreign terrorists if the Constitution crowned the president with absolute power to spy on American citizens at any time or place on his say-so alone. But it would cripple democracy. The people would be frightened from criticizing the government or undertaking anything unorthodox or nonconformist. The president would assemble a vast pool of political intelligence to intimidate or destroy his opponents. With little or no public questioning or challenge, presidential hubris would inescapably give birth to foreign follies. The Founding Fathers had a better idea in sticking with checks and balances, the worst architecture for maintaining a strong and flourishing democracy except for all others that have been attempted or conceived.

Concluding Observations

The constitutionality of FISA is indisputable according to customary canons of interpretation, especially original intent. The credence that has been afforded constitutional attacks on the statute testifies to the constitutional illiteracy of most members of Congress, the legal profession, and the public. They are unschooled in the philosophy of the Constitution, the *Federalist Papers*, Montesquieu's Spirit of the Laws, John Locke, the English Bill of Rights of 1688, or Magna Charta. They do not know that the history of unchecked power is a history of tyranny, that enlightened presidents do not crave absolute power, and that a government of laws is superior to a government of men in protecting fundamental individual freedoms or otherwise.

Thomas Jefferson presciently wrote that a people cannot expect to be both free and ignorant.[16] The Constitution is not self-executing. It must live in the hearts and minds of the American people to flourish. At present, that is not the case, as substantiated by the enactment of the Military Commissions Act of 2006 and a companion effort (not yet enacted) to give congressional sanction to President Bush's warrantless domestic surveillance program.[17] If the alarming trend toward ever-greater constitutional illiteracy is not

16. John Bartlett and Justin Kaplan, *Bartlett's Familiar Quotations*, 16th ed. (Boston: Little Brown, 1992), 344, no. 18.

17. S. 3930, 109th Cong., 2d sess. (2006).

reversed, the United States is destined to become a second edition of *The Decline and Fall of the Roman Empire* as chronicled by Edward Gibbon.

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The Comey conundrum

By Bruce Fein
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Former Acting Attorney General James Comey threatened to resign on March 11, 2004, over the lawlessness of the White House in collecting foreign intelligence. He withheld his resignation and continued serving. Why remains a conundrum after Mr. Comey's startling May 15 testimony before the Senate Judiciary Committee.

In the aftermath of September 11, 2001, President Bush instructed the National Security Agency (NSA) to target the e-mails and phone calls of U.S. citizens on American soil for interception on his say-so alone. The instruction flouted the Foreign Intelligence Surveillance Act of 1978 (FISA). Generally speaking, it requires a judicial warrant based on probable cause to believe the NSA's spying target is implicated in international terrorism or activity on behalf of a foreign nation. Exceptions to the warrant rule are crafted for emergencies or during a 15-day window in wartime.

FISA was the child of extensive congressional committee hearings in 1975-76 which revealed persistent spying abuses by an unchecked executive from President Franklin D. Roosevelt to President Richard M. Nixon. The unifying motive was to cripple or embarrass the president's political opponents.

FISA declared that the statute was the "exclusive" means for gathering foreign intelligence by spying on American citizens via electronic surveillance. Intentional violations were made felonies.

FISA's regulation of the president foreign intelligence authority is exceptionally modest. It generally applies only when American citizens in the United States with a reasonable expectation of privacy are the NSA's targets. But the spying agency ordinarily targets noncitizens abroad for electronic surveillance or physical searches where FISA has no application. In operation, the FISA has been untroublesome to the president's collection of foreign intelligence. Only a handful of warrant requests have been denied in

approximately 20,000 cases. On July 31, 2002, the Justice Department applauded FISA before the Senate Intelligence Committee as wonderfully nimble and flexible and in no need of amendment to lower the threshold for the NSA's spying.

FISA's constitutional credentials are thus impeccable. The Founding Fathers empowered Congress to enact "necessary and proper" laws for the execution of presidential authorities that stopped short of exerting a "controlling influence" over the chief executive. Accordingly, the United States Supreme Court has sustained mild congressional regulation of the president's law enforcement functions in creating independent counsels or independent agencies in Morrison v. Olson and Humphrey's Executor, respectively. FISA similarly eschews handcuffing the president's ability to collect foreign intelligence. Its scope is narrow. Its hurdles are readily surmounted. And since its enactment 29 years ago, no president has demonstrated FISA had prevented the collection of important foreign intelligence. It speaks volumes that the September 11 Commission did not recommend amending or relaxing FISA as a strategy for defeating international terrorism.

President Bush's flouting of FISA raised concerns at the Justice Department at some point. The NSA's domestic warrantless surveillance program had been periodically submitted to the attorney general for certification of its legality to authorize its renewal. As Mr. Comey testified to the Judiciary Committee, as acting attorney general because of Attorney General John Ashcroft's acute illness, he refused certification when renewal was required on March 11, 2004: "And a week before that March 11 deadline, I had a private meeting with the attorney general for an hour... and I laid out for him what we had learned and what our analysis was in this particular matter. ... And over the next week... we communicated to the relevant parties at the White House and elsewhere our decision that, as acting attorney general, I would not certify the program as to its legality, and explained our reasoning in detail."

President Bush, Vice President Dick Cheney, and the vice president's counsel, David Addington, were apparently aghast. Then White House counsel Alberto Gonzales and chief of staff Andrew Card were dispatched to persuade a disoriented and critically ill Mr. Ashcroft from his hospital bed to overrule Mr. Comey. They failed. Mr. Bush reauthorized the spying program without the department's certification. Mr. Comey then prepared a letter of resignation, and explained to the committee: "I believed I couldn't stay if the administration was going to engage in conduct that the Department of Justice had said had no legal basis."

On March 12, 2004, however, Mr. Bush reversed course and directed the department to do what it "thinks is right to get this [NSA spying program] to where the department thinks it ought to be." The department revised the program to the satisfaction of Mr. Comey, and his resignation letter was withdrawn. But Mr. Comey withheld both a description of the revisions and

the legal rationale for the revised program. How could he have been satisfied?

The revision was published by the New York Times in December 2005. The program still entailed NSA spying on the president's say-so alone contrary to FISA. The legal justification for evading FISA expounded by Attorney General Gonzales in a 42-page white paper before the Senate Judiciary Committee in February 2006 was laughably amateurish. A federal district court in Michigan has held the Comey-revised program illegal. The department later sought and received some type of FISA warrant that has yet to be disclosed.

More explanation should be demanded about Mr. Comey's decision to stay.

Bruce Fein is a constitutional lawyer at Bruce Fein & Associates and chairman of the American Freedom Agenda, an organization devoted to restoring checks and balances and protections against government abuses.

Mr. NADLER. Thank you.
Mr. Casey?

TESTIMONY OF LEE A. CASEY, PARTNER, BAKER HOSTETLER

Mr. CASEY. Thank you, Mr. Chairman. I appreciate the opportunity to appear today to discuss the constitutional limitations on domestic surveillance.

Ironically, the most controversial surveillance over the past several years has not been domestic at all, but rather the international surveillance involved in the NSA's Terrorist Surveillance Program. It is to the legal issues surrounding that program that I will address my remarks.

I should make clear that I am speaking here on my own behalf.

Let me begin by stating that I believe President Bush was fully within his constitutional and statutory authority when he authorized the TSP. The President's critics have variously described this program as widespread, domestic and illegal. Based upon the published accounts, it is none of these things. Rather, it is a targeted program on the international communications of individuals engaged in an armed conflict with the United States and is fully consistent with FISA.

In assessing the Administration's actions here, it is important to highlight how narrow is the actual dispute over the NSA program. Few of the President's critics claim that he should not have ordered the interception of al-Qaida's global communications or that he needed the FISA Court's permission to intercept al-Qaida communications abroad. It is only with respect to communications actually intercepted inside the United States or where the target is a United States person in the United States, that FISA is relevant at all to this national discussion.

Since this program involves only international communications, where at least one party is an al-Qaida operative, it is not clear that any of these intercepts would properly fall within FISA's terms. This is not the pervasive dragnet of American domestic communications about which so many of the President's critics have fantasized.

The Administration has properly refused to publicly articulate the full metes and bounds of the NSA program. Let us assume, however, that some of the intercepts are subject to FISA. As the Department of Justice correctly pointed out in its January 19, 2006, memorandum, FISA permits electronic surveillance without an order if it is otherwise authorized by statute. The NSA program was so authorized.

The September 18, 2001, authorization for the use of military force permits the President to use all necessary and appropriate force against those responsible for September 11, "in order to prevent any future acts of international terrorism against the United States." The Supreme Court has already interpreted this grant to encompass all of the fundamental incidents of waging war. In *Hamdi v. Rumsfeld,* the court considered and rejected the argument, then being advanced with respect to the Non-Detention Act that the September 18 authorization permitted only those types of force not otherwise specifically forbidden by statute.

The monitoring of enemy communications, whether or not within the United States, is as much a fundamental and accepted incident to war as is the detention of captured enemy combatants. Indeed, it is only through the collection and exploitation of intelligence that the September 18th authorization can be successfully implemented.

Even in the absence of that law, however, the TSP would fall within the President's inherent constitutional authority as chief executive and commander-in-chief. The U.S. Courts of Appeal that have considered the issue have upheld this authority. FISA's own Foreign Intelligence Surveillance Court of Review has acknowledged it, noting that FISA itself could not encroach upon it. And the Supreme Court has carved the area of foreign intelligence collection out of its fourth amendment warrant jurisprudence.

But if FISA were construed to prohibit, without judicial approval, the President's decision to monitor enemy communications into and out of the United States in wartime, then the statute would be invalid. Wars cannot be fought without intelligence and requiring the President as commander-in-chief to obtain an order to intercept enemy communications would be no less unconstitutional than would requiring judicial oversight of target selection. It need not and should not be so interpreted.

Thank you.

[The prepared statement of Mr. Casey follows:]

PREPARED STATEMENT OF LEE A. CASEY

I appreciate the opportunity to appear today to discuss the "Constitutional Limitations on Domestic Surveillance." Ironically, the most controversial surveillance over the past several years has not been "domestic" at all, but rather the international surveillance involved in the NSA's Terrorist Surveillance Program ("TSP"), and it is to the legal issues surrounding that program that I will address my remarks. I should make clear that I am speaking here on my own behalf.

Let me begin by stating that I believe President Bush was fully within his constitutional and statutory authority when he authorized the TSP, including his decision to permit the interception of al Qaeda communications into and out of the United States without first obtaining an order from the Foreign Intelligence Surveillance Act ("FISA") Court.

The President's critics have variously described the NSA program as "widespread," "domestic," and "illegal." It is none of these things. Rather, the program is limited, targeted on the international communications of individuals engaged in an armed conflict with the United States, and is fully consistent with FISA. First, in assessing the President's actions here, it is important to highlight how narrow is the actual dispute over the NSA's TSP. Few of the President's critics claim that he should not have ordered the NSA to monitor al Qaeda's communications on a global basis. Indeed, in the wake of the September 11, 2001 attacks, he would surely have been remiss in his duties had he not ordered this surveillance. Moreover, few of the President's critics have had the temerity to claim that he was required to obtain the FISA Court's permission to intercept and monitor al Qaeda communications outside of the United States.

It is, in fact, only with respect to communications actually intercepted by the NSA within the United States, as opposed to by satellites or listening posts located abroad, or where the "target" of the intercept is an American citizen or resident alien, that FISA is relevant at all to this national discussion. Despite the rhetoric, FISA is not a comprehensive statute that requires the President to obtain a "warrant" to collect foreign intelligence. It is a narrow law that requires an "order" be obtained for "electronic surveillance" in only four circumstances:

(1) Where a United States person in the United States is the target of, *rather than incidental to,* the surveillance;

(2) Where the acquisition of the intelligence will be accomplished by devices located within the United States;

(3) Where the sender and all recipients of the relevant communication are present in the United States; or

(4) Where surveillance devices are used within the United States to collect communications other than wire or radio communications.

That being the case, based upon how the President, Attorney General, and General Hayden (former head of NSA), have described the NSA program, it is not at all clear that any of the intercepts would properly fall within FISA in the first instance. In that regard, the NSA program appears to have been:

(1) targeted at al Qaeda operatives and their associates—in other words, communications are intercepted and monitored based on an al Qaeda association; and

(2) directed only at international communications with an al Qaeda operative or associate on one end: As General Hayden made clear, "one end of any call targeted under this program is always outside the United States;" and

(3) the purpose is not to collect evidence for a criminal prosecution, but to identify and thwart additional attacks against the United States.

Whatever this program is, it is not the pervasive dragnet of American domestic communications about which so many of the Administration's critics have fantasized. Moreover, unless some of these communications are intercepted in the United States, or the targeted al Qaeda operative happens also to be a "United States person," FISA does not apply by its own terms.

The Administration has properly refused to publicly articulate the full metes and bounds of the NSA program. For the sake of argument, however, let us assume that some of the communications intercepted as part of this program are intercepted within the United States, or that some of the targeted al Qaeda operatives are "United States persons" within FISA's meaning. (This would include American citizens, permanent resident aliens, and U.S. corporations. 50 U.S.C. § 1801(i)). The program remains lawful and constitutional.

Indeed, the TSP clearly falls within the President's inherent constitutional authority, under Article II, as Chief Executive and Commander-in-Chief. This authority has been consistently recognized and respected, with the exception of one District Court decision now on appeal, by the United States' courts. Indeed, the United States Foreign Intelligence Surveillance Court of Review, established under FISA, has itself acknowledged this authority. In *In re Sealed Case No. 02–001,* where the Court of Review reversed an effort by the FISA trial court to reimpose a kind of "wall" between intelligence gathering and law enforcement, despite Congress' amendment of FISA as part of the Patriot Act, the Court also noted that: "all the other courts to have decided the issue, held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information." 310 F.3d 717, 742 (FISA Ct. of Review 2002). It went on to state that "[w]e take for granted that the President does have that authority [to conduct warrantless surveillance for foreign intelligence purposes] and, assuming that is so, FISA could not encroach on the President's constitutional power." *Id.*

Significantly, in this connection, the FISA Court of Review was discussing another important precedent, *United States v. Truong,* 629 F.2d 908 (4th Cir. 1980). This is, in fact, the leading case recognizing the President's inherent power, as a function of his role in formulating and implementing U.S. foreign policy, to order warrantless electronic surveillance for foreign intelligence purposes. This power exists even when the surveillance is in the United States and directed at an American citizen. In *Truong,* the Carter Administration authorized warrantless wire-tapping of a resident alien and an American citizen, in the United States, in a successful effort to identify the source of classified documents being illegally transmitted to foreign government representatives.

The defendants challenged their espionage convictions by arguing that this surveillance violated the Fourth Amendment guarantee against unreasonable searches and seizures and the attendant warrant requirement. In response, the Carter Administration stated without equivocation that: "In the area of foreign intelligence, the government contends, the President may authorize surveillance without seeking a judicial warrant because of his constitutional prerogatives in the area of foreign affairs." *Truong,* 629 F.2d at 912. The United States Court of Appeals for the Fourth Circuit agreed, and ruled that the warrantless surveillance ordered in this case had been lawful. The court reasoned as follows:

> For several reasons, the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would, following [*United States v. United Stated District Court (Keith),* 407 U.S. 297 (1972)], "unduly frustrate" the President in carrying out his foreign affairs responsibilities. First of all, attempts to counter foreign threats to the national security require the utmost

> stealth, speed, and secrecy. A warrant requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations. [Citations omitted.]
>
> More importantly, the executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance. . . .
>
> Perhaps most crucially, the executive branch not only has superior expertise in the area of foreign intelligence, it is also constitutionally designated as the preeminent authority in foreign affairs. [Citations omitted]. The President and his deputies are charged by the Constitution with the conduct of the foreign policy of the United States in times of war and peace. [Citations omitted.] Just as the separation of powers in *Keith* forced the executive to recognize a judicial role when the President conducts domestic surveillance, [citations omitted] so the separation of powers requires us to acknowledge the principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance.

Truong, 629 F.2d at 913–14.

FISA was, of course, enacted shortly before the decision in *Truong* was announced, and the court did not, therefore, address the law's impact as part of its holding. Neither has the Supreme Court considered whether, or to what extent, FISA may have trenched upon the President's constitutional authority. This, however, is the question we are left with. President Bush did not invent this authority, as some critics have implied, nor has he asserted more power than his predecessors have claimed. As explained by the Justice Department in its January 19, 2006, Memorandum (pp. 7–8, 16–17), various forms of warrantless electronic surveillance have been utilized since the Civil War. Presidents Franklin D. Roosevelt and Harry S. Truman authorized, without judicial participation, the use of wiretaps as a means of obtaining intelligence against the United States' enemies, as did President Woodrow Wilson. *See* Exec. Order No. 2604 (Apr. 28, 1917). Both the Carter and Clinton Administrations also affirmed the President's inherent constitutional authority to conduct warrantless surveillance and/or searches for foreign intelligence purposes. *See* January 19 DOJ Memorandum, p. 8.

As to the question whether Congress exceeded its authority in enacting FISA, the answer depends very much on how that law is interpreted and applied. The interplay between the Executive and Congress is, in the best of circumstances, complex and shifting. As a general proposition, Congress is entitled to legislate on any number of matters that may impact how the President discharges his constitutional role. The test is whether Congress has "impede[d] the President's ability to perform his constitutional duty." *Morrison v. Olson,* 487 U.S. 654, 691, 695–96 (1988) (appointment of independent counsel by special judicial body, and imposition of a removal for cause requirement, did not impermissibly impede the President's authority, where there were a number of other means by which the officials activities could be supervised). If FISA were construed to prohibit the President, without judicial approval, from monitoring enemy communications into and out of the United States during wartime, then the statute could fairly be said to impede the President's exercise of his constitutional authority and would, to that extent, be invalid. It need not, and should not, be so interpreted.

In this connection, it should also be noted that the Executive Branch secures one very valuable advantage when it does obtain an order pursuant to FISA's provisions—the evidence collected pursuant to such an order will almost certainly be admissible in a later criminal proceeding. *See, e.g., United States v. Squillacote,* 221 F.3d 542, 553–54 (4th Cir. 2000), *cert. denied,* 532 U.S. 971 (2001). At the same time, hard choices are often necessary during an armed conflict. If the President determines that the process established in FISA is insufficiently protective of national security, as he has done with respect to the NSA program, and he is prepared to risk having intelligence information secured without a FISA order later ruled inadmissible in court (as the *Truong* Court suggested was a possibility in certain circumstances, 629 F.2d at 915), then he is fully entitled to rely on his constitutional authority alone. To the extent that Congress sought to forbid such reliance, and to foreclose the President's right to order the interception, without a FISA order, of enemy communications in wartime, it exceeded its constitutional authority.

In any case, assessment of the TSP's legality need not go so far. As the Department of Justice correctly pointed out in its memorandum of January 19, 2006, "Legal Authorities Supporting the Activities of the National Security Agency De-

scribed by the President," FISA itself provides that electronic surveillance otherwise subject to the statute can lawfully be accomplished without a FISA order if it is "authorized by statute." 50 U.S.C. § 1809(a)(1). The surveillance of al Qaeda, in the United States or anywhere else in the world, has been authorized by statute—in the form of the September 18, 2001 Authorization for the Use of Military Force. 50 U.S.C. § 1541 note.

That statute specifically authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, *in order to prevent* any future acts of international terrorism against the United States by such nations, organizations or persons." (Emphasis added).

This is a broad grant. There are, of course, many who argue that the September 18 Authorization was not broad enough to permit the NSA program because it did not specifically reference electronic surveillance or FISA. Significantly, however, an identical argument was advanced with respect to the capture and detention of certain al Qaeda and Taliban operatives under the "Non-detention Act," 18 U.S.C. § 4001(a). That law forbids the detention of American citizens save as authorized by act of Congress and specifically provides that: "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." It should go without saying that the Non-detention Act, and the principle it seeks to implement, are as important to our system of ordered liberty as is FISA.

Nevertheless, in *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004), the Supreme Court correctly interpreted the September 18, 2001 Authorization for the Use of Military Force to authorize the President to detain American citizens, consistent with 18 U.S.C. § 4001(a), because that authorization must be interpreted to permit all of the normal incidents of war. As explained by Justice O'Connor in her plurality opinion (which commanded a majority of 5 votes on this point), the detention of captured enemies "is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." 542 U.S. at 518.

Surely, the monitoring of enemy communications, whether into or out of the United States, is also such a "fundamental and accepted" incident to war. That is how wars are fought; that is how wars have always been fought; and it is especially how this war must be fought. Only through the collection and exploitation of intelligence can the purpose of Congress' September 18, 2001, Authorization—"to prevent any future acts of international terrorism against the United States"—be achieved. For his part, the President has not claimed the right to surveil the American population in general, but only enemy agents as they communicate into and out of the United States.

This type of intelligence gathering has been a critical part of warfare since the first man with a spear crept to the edge of his enemy's camp listening for voices in the night. As George Washington explained to an American agent during the War for Independence, the "necessity of procuring good intelligence, is apparent and need not be further urged. All that remains for me to add is, that you keep the whole matter as secret as possible. For upon secrecy, success depends in most Enterprizes of the kind, and for want of it, they are generally defeated." *CIA v. Sims,* 471 U.S. 172 n.16 (1984) (quoting letter from George Washington to Colonel Elias Dayton, July 26, 1777). In ordering this surveillance the President acted fully in accordance with an express congressional authorization, at the very zenith of his powers as outlined in Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952).

For those who claim that the September 18, 2001, Authorization cannot be read to have amended FISA; it did not. FISA remains intact, just as the Non-detention Act remains intact. The September 18, 2001 Authorization works with these laws, not against them. Of course, had Congress formally declared war, under FISA section 111 (50 U.S.C. § 1811), the entire statute would have been suspended for 15 days. During that period, the President would have been free to target anyone and everyone's electronic communications, not merely those of known al Qaeda operatives. This program is much more limited.

Obviously, there are those who disagree with this analysis. There are few questions of either constitutional or statutory interpretation that cannot be debated, and debated in good faith. Arguing about what the Constitution's Framers or Congress meant on any particular occasion is how many of us in the legal profession earn our livings. However, claims that the President or his Administration have acted unlawfully, or beyond his constitutional authority, are groundless.

This is especially the case in view of the fact that there has been no suggestion that the President has misused or abused any of the information obtained from the

NSA program. By all accounts, it has been utilized in carrying out Congress' instructions in the September 18, 2001, Authorization—"to prevent any future acts of international terrorism against the United States." Individual Senators, and members of this Committee of both parties, may well honestly believe that this law did not authorize the President to use any incident of force that is otherwise prohibited by statute, and their opinions must be respected. However, the Supreme Court disagreed only two years ago in the *Hamdi* case. That case supports the President's position with respect to the NSA program.

For a more complete statement of my views, please see Andrew C. McCarthy, David B. Rivkin, Jr. & Lee A. Casey, *NSA's Warrantless Surveillance Program: Legal, Constitutional and Necessary,* which is available at: http://www.fed-soc.org/doclib/20070522_terroristsurveillance.pdf

Thank you, and I would be pleased to answer any questions the Committee may have.

Mr. NADLER. Thank you.

Mr. Jaffer?

TESTIMONY OF JAMEEL JAFFER, DIRECTOR, NATIONAL SECURITY PROJECT, AMERICAN CIVIL LIBERTIES UNION

Mr. JAFFER. Thank you, Chairman Nadler.

Chairman Nadler, Ranking Member Franks, thank you for inviting me to testify today about surveillance conducted by the NSA, and authorized by the President in violation of statutory and constitutional law.

The ACLU is grateful for your efforts to determine the scope of the NSA's unlawful activities and for your efforts to ensure that statutory and constitutional limits on the President's power are being honored.

I testify today as director of the ACLU's National Security Project and as counsel to the plaintiffs in *ACLU v. NSA.* In early 2006, soon after the NSA's warrantless surveillance activities became public, the ACLU sued on behalf of a coalition of journalists, scholars, defense attorneys and national nonprofit organizations to challenge the NSA's warrantless surveillance activities inside the Nation's borders.

The lawsuit alleges that the NSA's activities violate FISA, which requires that intelligence surveillance inside the U.S. be conducted with judicial oversight. The suit also alleges that the NSA's activities violate the constitutional principle of separation of powers, as well as the First and fourth amendments. In August of 2006, the U.S. District Court for the Eastern District of Michigan agreed with us on all counts, but the Government has appealed this ruling to the Sixth Circuit. The appeal has now been argued and we are awaiting the court's decision.

Because my time before the Subcommittee is limited, I would like to summarize my main concerns about the NSA's activities very briefly. I would also like to suggest next steps for this Subcommittee and the Congress.

The first thing I would like to stress is that the NSA's warrantless surveillance activities are illegal. With narrow exceptions, FISA prohibits the executive branch from intercepting the contents of emails and telephone calls without first obtaining judicial authorization for the surveillance. This prohibition applies whenever the communications are acquired inside the U.S. It also applies whenever the person targeted by the surveillance is a U.S. citizen or resident. To intentionally violate FISA is a crime.

In its legal papers and in public statements, the Administration has contended that Congress implicitly amended FISA and authorized the NSA's warrantless surveillance activities when it passed the AUMF in 2001. This is a specious argument. The AUMF makes no mention of domestic surveillance and Senator Daschle has said that in drafting the AUMF, Congress rejected proposals that would have expanded the President's authority to act within the U.S.

The Administration has also argued that the President possesses the authority as commander-in-chief to disregard FISA and the fourth amendment's warrant requirements, but this argument—the argument that the President is above the law—is one that the Supreme Court has rejected repeatedly and forcefully. Under the Constitution, the President and Congress share authority in the fields of war and foreign affairs. While the President surely has authority to act in these fields, Congress has the power to regulate the President's authority, and this is precisely what Congress did when it enacted FISA.

In violating FISA, the President broke the law. To the extent his actions were intentional, and they appear to have been, his actions were criminal. With this in mind, it is absolutely imperative that this Congress demand transparency about the Administration's surveillance activities, both past and ongoing. The ACLU is concerned that though the NSA surveillance activities were disclosed more than a year ago, Congress has not issued subpoenas demanding that the Administration explain the nature and scope of its activities.

It has not issued subpoenas demanding that the Administration disclose the legal opinions on which it has relied. It has not issued subpoenas to the telecommuncations corporations that facilitated the Administration's unlawful activities. And it has not issued subpoenas to determine how the fruits of unlawful surveillance have been used. Congress needs this information and it should demand that this information be disclosed immediately.

Congress should also demand information about the Administration's ongoing surveillance activities. The President has expressly claimed the authority to disregard FISA in the future. For all we know, he may be disregarding it now. Congress should find out.

Congress should also demand transparency about any surveillance activities that are being conducted on the authority of orders issued by a FISA judge in January of this year. The Administration's public statements about those orders suggest that the orders may be programmatic and categorical, rather than individualized as FISA and the fourth amendment require.

Congress' obligation, of course, is not simply to examine the Administration's unlawful activities, but to ensure that those activities do not continue. To this end, Congress should use this appropriations and authorization cycle to prohibit the use of funds to engage in electronic surveillance that does not comply with FISA or that is conducted on the basis of programmatic orders, rather than individualized and particularized warrants.

Congress has a critical role to play in ensuring that the rights of innocent U.S. citizens and residents are protected now and in the future.

Thank you again for holding this hearing. I look forward to your questions.

[The prepared statement of Mr. Jaffer follows:]

PREPARED STATEMENT OF JAMEEL JAFFER

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Testimony of Jameel Jaffer
Director of the National Security Project of the
American Civil Liberties Union Foundation

Before
The House Subcommittee on the Constitution,
Civil Rights, and Civil Liberties

Oversight Hearing on the Constitutional Limitations on Domestic Surveillance

June 7, 2007

Thank you for inviting me to testify before the Subcommittee. On behalf of the American Civil Liberties Union (ACLU), its hundreds of thousands of activists and members, and fifty-three affiliates nationwide, I urge you immediately to:

1) subpoena all documents relating to warrantless surveillance conducted by the National Security Agency ("NSA") on U.S. soil since September 2001 and subpoena testimony from those officials who initiated, reviewed, authorized, or conducted such surveillance;

2) subpoena all documents relating to the surveillance orders issued by a judge of the Foreign Intelligence Surveillance Court ("FISC") on January 10, 2007, including the orders themselves, all documents submitted by the executive branch to the FISC in connection with those orders, and any subsequent FISC orders reauthorizing, modifying, vacating or otherwise relating to the January 10, 2007 orders;

3) subpoena all documents relating to the collection of phone or other records for intelligence or anti-terror purposes in absence of the explicit statutory authority to do so since September 2001;

4) end the Bush administration's unlawful surveillance practices by using this appropriations and authorization cycle to prohibit the use of funds to engage in electronic surveillance that does not comply with the Foreign Intelligence Surveillance Act ("FISA") or that is conducted on the basis of programmatic or categorical orders rather than the individual and particularized warrants that are required by the Fourth Amendment to the U.S. Constitution.

My name is Jameel Jaffer, and I am a litigator for the ACLU and Director of the ACLU's National Security Project. Over the last five years, I have litigated several cases concerning government surveillance, including cases involving FISA and cases involving the FBI's use of national security letters. Since January of 2006, I have been counsel to the plaintiffs in *ACLU v. NSA*,[1] a case challenging the legality of warrantless surveillance conducted by the NSA. I am also counsel to the plaintiffs in *ACLU v. Department of Justice*,[2] a Freedom of Information Act lawsuit for records relating to the NSA's unlawful surveillance activities. The ACLU is litigating these cases because we believe that the NSA's surveillance activities raise constitutional concerns of the highest order. It is no exaggeration to say that the administration's defense of the NSA's activities, a defense that arrogates to the President the authority to disregard laws duly enacted by Congress, presents a challenge to the very foundations of constitutional government.

Many facts about the NSA's unlawful surveillance activities are now a matter of public record; they have been reported by the press and confirmed by senior administration officials. Soon after September 2001, President Bush authorized the NSA to conduct foreign intelligence surveillance inside the nation's borders without compliance with FISA.[3] Although FISA generally requires the executive branch to obtain warrants before intercepting

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[1] 438 F.Supp.2d 754 (E.D.Mich. 2006), *available at* http://www.aclu.org/pdfs/safefree/nsamemo.opinion.judge.taylor.081706.pdf

[2] *ACLU v. Dep't of Justice*, No. 06-ca-0214. (D.D.C).

[3] *See, e.g.*, James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, NEW YORK TIMES, Dec. 16, 2005; The President's Radio Address, 41 WEEKLY COMP. PRES. DOC. 1880 (Dec. 17, 2005), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2005_presidential_documents&docid=pd26de05_txt-9.pdf.; Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, Press Briefing (Dec. 19, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html.

electronic or wire communications inside the United States,[4] President Bush authorized the NSA to intercept such communications without judicial oversight.

In January of 2006, some six weeks after the *New York Times* disclosed the existence of the NSA's warrantless surveillance program, we filed a legal challenge to the NSA's activities on behalf of a coalition of journalists, scholars, attorneys, activists, and civil rights organizations. The plaintiffs in the suit include Larry Diamond, who is a Senior Fellow at the Hoover Institution; Barnett Rubin, who is an Afghanistan scholar at New York University; James Bamford, who is the nation's leading expert on the NSA; and Christopher Hitchens, the well-known writer. The plaintiffs also include Nancy Hollander, a prominent criminal defense attorney in New Mexico; Nazih Hassan, a community activist in Michigan; and the Council on American-Islamic Relations. This is to say that the plaintiffs are a diverse group and their political views span the spectrum. By joining the lawsuit, however, they expressed a shared commitment to constitutional government and the rule of law.

In August of 2006, in response to our lawsuit, a federal judge in the Eastern District of Michigan issued an injunction against the NSA's illegal surveillance activities, finding that the NSA's activities violated FISA, the constitutional principle of separation of powers, and the First and Fourth Amendments to the U.S. Constitution.[5] Three weeks ago, former Deputy Attorney General James Comey testified that there were serious concerns about the lawfulness of the NSA's activities even inside the Justice Department, and that at one point Justice Department attorneys determined

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[4] 50 U.S.C. § 1805. FISA permits the executive branch to conduct warrantless surveillance for up to 72 hours in emergency situations. 50 U.S.C. § 1805(f). It also permits the executive branch to conduct warrantless surveillance for 15 days after a congressional declaration of war. 50 U.S.C. § 1811. Finally, warrantless surveillance may be conducted under what is commonly referred to as "the embassy exception." 50 U.S.C. § 1802 permits the Attorney General to certify that the communications to be tapped are solely between foreign powers and that there is no substantial likelihood that U.S. communications will be intercepted. The administration has not contended that the NSA's warrantless surveillance activities fall within the scope of these exceptions.

[5] *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006). The government has appealed this decision and the Court of Appeals has granted a stay of the lower court decision pending appeal. *ACLU v. NSA*, Nos. 06-2095/2140 (6th Cir. Oct. 4, 2006).

that the NSA's activities were illegal.[6] Nonetheless, administration officials have sought to characterize our lawsuit, and criticisms of the NSA's activities more generally, as naïve, misguided, and even dangerous. President Bush, contending that the NSA's activities are necessary to protect national security, has said that "if al Qaeda or their associates are making calls into the United States or out of the United States, we want to know what they're saying."[7] Statements like this are deeply misleading. Nothing in FISA forecloses the executive branch from monitoring the communications of suspected terrorists, whether those suspected terrorists are outside the nation's borders or inside them. FISA simply requires that such surveillance be conducted with judicial oversight. Our lawsuit seeks only to enforce FISA.

The oversight of this Subcommittee is exceptionally important – perhaps now more than ever. As you know, the government announced on January 17, 2007, that it had obtained orders from a FISC judge authorizing it to engage in certain surveillance that had previously been conducted without judicial authorization, and that it would no longer recertify the so-called "Terrorist Surveillance Program."[8] It is important to recognize that this development does not provide *any assurance whatsoever* about the NSA's current activities. It instead adds another layer of oversight that this Subcommittee must conduct in order to determine whether these new orders are lawful. The administration's public statements about the January 10, 2007 orders strongly suggest that these orders are programmatic or categorical in nature rather than individualized and particularized, as both FISA and the Fourth Amendment require.

Further, and perhaps most importantly, the President continues to claim the authority to engage in surveillance that is prohibited by FISA and return to the regime of warrantless wiretapping whenever he sees fit; indeed, government officials have repeatedly made this claim on behalf of the

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[6] *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys? – Part IV: Hearings Before the S. Comm. on the Judiciary*, 110th Cong. 1st Sess. (May 15, 2007) (testimony of former Deputy Attorney General James Comey).

[7] Press Conference with the President of the United States (May 11, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/05/20060511-1.html.

[8] Government's Supplemental Submission Discussing the Implications of the Intervening FISA Court Orders of January 10, 2007 (hereinafter "Govt. Supp. Br.") at 2, *ACLU v. NSA*, Nos. 06-2095/2140 (filed Jan. 24, 2007). Although the NSA's activities implicate the communications of innocent U.S. citizens and permanent residents, the government refers to the NSA's warrantless surveillance program as the TSP – the "Terrorist Surveillance Program."

President.[9] As long as the administration maintains that it can revert to warrantless wiretapping at any time, this Subcommittee must fully air the extent of past illegal activities to better prevent them in the future. In light of the exceptionally serious concerns about the executive's ongoing surveillance activities, this Subcommittee's work is imperative.

I. The NSA's warrantless surveillance activities violate the Foreign Intelligence Surveillance Act, the constitutional principle of separation of powers, and the Fourth Amendment.

a. The NSA's warrantless surveillance activities violate the Foreign Intelligence Surveillance Act.

FISA grants the FBI wide latitude to monitor the communications of people who are thought to be "agents of a foreign power," defined to include those who act on behalf of foreign governments or are members of foreign terrorist organizations. However, the statute also includes important safeguards against abuse. It sets out specific procedures that the executive branch must follow in order to initiate foreign intelligence surveillance inside the United States. The executive must submit a written application to a specially constituted intelligence court.[10] The application must show that a "significant purpose" of the surveillance is to gather information about foreign threats to the country — rather than, for example, to gather evidence of criminal activity by purely domestic groups. The application must also show "foreign intelligence probable cause" — that is, probable cause to believe that the target of the surveillance is the agent of a foreign

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[9] *Hearing before the S. Judiciary Comm. on Department of Justice Oversight*, 110th Cong., 25 (Jan. 18, 2007) (Attorney General Gonzales explaining that the President initially authorized the surveillance without FISA court involvement "because there was a firm belief, *and that belief continues today* that he does have the authority under the Constitution to engage in electronic surveillance of the enemy in a limited basis during a time of war") (emphasis added); Transcript of Background Briefing by Senior Justice Department Officials, Jan. 17, 2007, *available at* http://www.fas.org/irp/news/2007/01/doj011707.html (Senior Justice Department official explaining "*we continue to believe* as we've always said . . . that the President has the authority to authorize the terrorist surveillance program, that he has that authority under the authorization for the use of military force and under Article II of the Constitution. *That's not changing*") (emphasis added).

[10] *See supra* note 4 for three narrow exceptions to the court order requirement of FISA.

government, political group, or terrorist group. And finally any information gathered through the surveillance must be subjected to "minimization" procedures meant to protect the private information of innocent U.S. citizens and permanent residents.[11]

The NSA's surveillance activities, as described by senior administration officials, have not complied with any of these requirements. According to public statements by the President, the Attorney General, and other senior administration officials, the NSA's activities have involved, among other things, the warrantless interception of telephone calls that originate or terminate inside the United States.[12] The intercepts have not been subject to judicial oversight, and they have not been based on probable cause.[13] Instead, these intercepts have been initiated on the basis of a NSA shift supervisor's unilateral determination, based on "reasonable suspicion," that one party to the communication is associated with al Qaeda.[14] The NSA has plainly violated FISA, and administration officials have conceded as much.[15]

In its legal papers and in public statements, the administration has made the argument that Congress authorized the NSA to engage in

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[11] FISA and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 together supply "the *exclusive means* by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted" within the U.S. 18 U.S.C. § 2511(2)(f).

[12] The President's Radio Address (Dec. 17, 2005), *supra* note 3; Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, Press Briefing (Dec. 19, 2005) (statement of Alberto Gonzales), *supra* note 3; General Michael Hayden, Principal Deputy Director of National Intelligence, Address to the National Press Club (Jan. 23, 2006), *available at* http://www.dni.gov/release_letter_012306.html).

[13] *Wartime Executive Power and the NSA's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (Feb. 6, 2006) (statement of Attorney General Alberto Gonzales); Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, Press Briefing (Dec. 19, 2005), *supra* note 3.

[14] Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, Press Briefing (Dec. 19, 2005), *supra* note 3.

[15] *Id.*; General Michael Hayden, Principal Deputy Director of National Intelligence, Address to the National Press Club, *supra* note 12.

warrantless surveillance inside the U.S. when it passed the Authorization for Use of Military Force ("AUMF").[16] This argument, which the government presents as a "construction" of the AUMF, is actually a wholesale rewriting of it. The AUMF addresses military action against the Taliban and al Qaeda but it does not mention electronic surveillance and it certainly does not mention warrantless wiretapping inside the nation's borders. Notably, Senator Arlen Specter (R-PA) has said that he does "not think that any fair, realistic reading of the [AUMF] gives [the President] the power to conduct electronic surveillance."[17] Senator Lindsey Graham (R-SC) has said that, when he voted for the AUMF, he "never envisioned that [he] was giving to this President or any other President the ability to go around FISA carte blanche."[18] Then-Senator Tom Daschle (D-SD) has noted that legislators considered including language in the AUMF to permit activities on U.S. soil but categorically rejected the proposal.[19] The argument that Congress authorized warrantless surveillance inside the U.S. when it passed the AUMF has no basis in the text of the resolution or in the resolution's legislative history.

b. The NSA's warrantless surveillance activities violate the constitutional principle of separation of powers.

Having suffered the reign of King George III, the Framers of the U.S. Constitution believed that "[t]he accumulation of powers, legislative, executive, and judiciary in the same hands . . . may justly be pronounced the

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[16] Authorization of Use of Military Force, Public Law 107-40 (2001).

[17] *Wartime Executive Power and the NSA's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary, supra* note 13.

[18] Charles Babington , *Privacy Concerns, Terror Fight at Odds*, WASH. POST, Feb. 7, 2006, A04.

[19] Tom Daschle, *Power We Didn't Grant*, WASH. POST, Dec. 23, 2005, at A21. Accepting the government's argument would require one to conclude not only that the AUMF's general language authorized a program of judicially unsupervised electronic surveillance within the nation's borders but also that the same general language implicitly repealed FISA, which expressly prohibits electronic surveillance except under the terms of FISA itself. As the Supreme Court has held repeatedly, repeals by implication are rarely recognized and can be established only by overwhelming evidence that Congress intended the repeal. *J.E.M. Ag. Supply, Inc. v. Pioneer Hi Bred Int'l, Inc.*, 534 U.S. 124, 137 (2001). Here, all of the evidence is to the contrary.

very definition of tyranny."[20] The Framers therefore "built in to the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[21] Because the Framers feared the concentration of power in one branch, the Constitution "diffuses power[,] the better to secure liberty."[22]

One corollary of the separation of powers — perhaps the corollary most vital to American democracy — is that the President is not "above the law."[23] The legislative power is vested in Congress,[24] and it is the President's role to "take Care that the Laws be faithfully executed."[25] Accordingly, where Congress has enacted a law within the scope of its constitutionally provided authority, the President lacks authority to disregard it. If the President could disregard duly enacted statutes, "it would render the execution of the laws dependent on his will and pleasure."[26] As Justice Kennedy recently cautioned, "[c]oncentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid."[27]

The law at issue here – FISA – is one that Congress plainly had the authority to enact, because the Constitution invests Congress with broad authority in the fields of commerce, foreign intelligence, foreign affairs, and war.[28] The Constitution invests Congress with broad authority "to deal with foreign affairs,"[29] and "to legislate to protect civil and individual liberties."[30]

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[20] *The Federalist No. 47* (James Madison).

[21] *Clinton v. Jones*, 520 U.S. 681, 699 (1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)).

[22] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[23] *United States v. Nixon*, 418 U.S. 683, 715 (1974).

[24] U.S. Const., Art. I § 1.

[25] U.S Const., Art. II § 3.

[26] *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806).

[27] *Hamdan v. Rumsfeld*, 126 S. Ct 2749, 2800 (2006) (Kennedy, J., concurring).

[28] *See* U.S. Const., Art. I, § 8, cl. 1; "declare War," *id.* cl. 11; "grant Letters of Marque and Reprisal," *id.*; "make Rules concerning Captures on Land and Water," *id.*; "raise and support Armies," *id.* cl. 12; "provide and

In its legal papers, the administration has contended, correctly, that the President possesses authority in some of these fields as well – and in particular that the Constitution states that the President "shall be Commander in Chief of the Army and Navy of the United States." U.S. Const. Art. II, § 2. That the President possesses such authority, however, does not mean that he can act in disregard of a duly enacted federal statute. The Supreme Court addressed precisely this issue in *Youngstown*,[31] a case that involved President Truman's attempted seizure of the nation's steel mills during the Korean War. In *Youngstown*, the government argued that the seizures were a permissible exercise of the President's authority as Commander in Chief and of the President's "inherent" authority to respond to emergencies. The Supreme Court rejected this argument, finding that the President could not constitutionally disregard a statute that implicitly prohibited the seizures. The Court wrote, "The President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."[32]

The Supreme Court recently reaffirmed *Youngstown* in *Hamdan v. Rumsfeld*, in which the Court found that military commissions set up by the President to try prisoners held at Guantanamo did not comply with the Uniform Code of Military Justice, a statute enacted by Congress in exercise of its constitutional war powers.[33] Justice Stevens, writing for the Court, wrote that "[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."[34] Justice Kennedy expanded on the same

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maintain a Navy," *id.* cl. 13; "make Rules for the Government and Regulation of the land and naval Forces," *id.* cl. 14; and "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested . . . in the Government of the United States," *id.* cl. 18.

[29] *Afroyim v. Rusk*, 387 U.S. 253, 256 (1967).

[30] *Shelton v. United States*, 404 F.2d 1292, 1298 n.17 (D.C. Cir. 1968).

[31] 343 U.S. 579.

[32] *Id.* at 587.

[33] 126 S.Ct. 2749.

[34] *Id.* at 2774, n.23.

point in concurrence: "This is not a case . . . where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority."[35] Justice Kennedy continued: "Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment."[36]

The application of the *Youngstown-Hamdan* framework to the present context is straightforward. The executive branch does not have the authority to disregard FISA any more than it had the authority to disregard the Uniform Code of Military Justice in *Hamdan* or the Labor Management Relations Act in *Youngstown*. Like the statutes that were at issue in those cases, FISA was the result of "a deliberative and reflective process engaging both of the political branches."[37] Notably, when it was enacted, FISA was fully supported by the President, the Attorney General, and the directors of the FBI, CIA, and NSA. In his signing statement, President Carter characterized the statute as the result of "the legislative and executive branches of Government work[ing] together toward a common goal."[38] To use Justice Kennedy's phrase, FISA was a law "derived from the customary operation of the Executive and Legislative Branches."[39]

In public statements, the President has suggested that FISA is outdated, inefficient, or burdensome. The President's doubts about a law's efficiency or wisdom, however, do not give him the authority to disregard it. "All executive power – from the reign of ancient kings to the rule of modern dictators – has the outward appearance of efficiency."[40] If the President

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[35] *Id.* at 2799.

[36] *Id.*

[37] *Id.*

[38] Jimmy Carter, Statement on Signing S. 1566 Into Law (Oct. 25, 1978), *available at* http://www.cnss.org/Carter.pdf.

[39] *Hamdan*, 126 S. Ct. at 2799.

[40] *Youngstown*, 343 U.S. at 629 (Douglas, J. concurring).

believes FISA is unwise, the President ought to make his case to Congress, and Congress can amend the law if it sees fit.

In its legal papers, the administration turns the separation-of-powers doctrine on its head, contending that if the NSA's activities violate FISA, then FISA is an unconstitutional encroachment on the President's constitutional authority to defend the nation against attack.[41] But if the NSA's warrantless surveillance activities conflict with FISA (as the government has conceded that it does), it is the NSA's conduct, not FISA, that is unconstitutional. That is the clear import of *Youngstown* and *Hamdan*. The President might have constitutional authority to engage in warrantless foreign intelligence surveillance in the context of Congressional silence; in fact some courts reached this conclusion before FISA was enacted, as I discuss further below. But, through FISA, Congress has permissibly acted in a field of shared constitutional authority to regulate the exercise of the President's power. The *Youngstown-Hamdan* line of cases makes clear that the President cannot simply ignore limitations that Congress has, in proper exercise of its own authority, placed on his authority.

The government's argument is especially troubling because the Program involves activity that takes place not on a far-away battlefield but inside the nation's borders. The President's war powers, even broadly construed, cannot supply a basis for unchecked intrusion into the communications of U.S. citizens and residents. As the Supreme Court wrote presciently in *Youngstown*, "Even though the 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief has [the authority to seize property inside the United States]. This is a job for the Nation's lawmakers, not for its military authorities."[42]

c. The NSA's warrantless surveillance activities violate the Fourth Amendment.

The framers drafted the Fourth Amendment in large part to prevent the executive branch from engaging in the kind of general searches used by King George to harass and invade the privacy of the colonists.[43] It has been settled law for almost forty years that the Fourth Amendment requires the

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[41] Brief of Appellants at 56, *ACLU v. NSA*, Nos. 06-2095/06-2140 (6th Cir. Oct. 16, 2006), *available at* http://www.aclu.org/safefree/nsaspying/28118lgl20061013.html.

[42] *Youngstown*, 343 U.S. at 587 (Jackson, J., concurring).

[43] *Berger v. New York*, 388 U.S. 41, 58 (1967).

government to obtain a warrant before intercepting the content of a telephone call.[44]

The Supreme Court has never recognized an exception to the warrant requirement for intelligence surveillance inside the United States. In *Keith*, the Court unequivocally declared Fourth Amendment protections applicable to surveillance conducted for security purposes.[45] Indeed, it observed that "security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent."[46] While *Keith* concerned surveillance relating to domestic security threats, the *Keith* Court's reasoning applies with equal force to foreign security threats. Plainly, a neutral intermediary between citizens and executive officers is no less necessary because the threat comes from foreign agents rather than domestic ones.[47]

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[44] *See Katz v. United States*, 389 U.S. 347, 352 (1967); *Berger*, 388 U.S. at 51.

[45] *United States v. United States District Court*, 407 U.S. 297 (1972) ("Keith").

[46] *Id.* at 320.

[47] In its legal papers, the government cites a number of cases that recognized a foreign intelligence exception to the warrant requirement. *See, e.g., U.S. v. Truong Dinh Hung*, 629 F.2d 908, 912-5 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593, 604-05 (3d Cir. 1974) (en banc); *United States v. Buck*, 548 F.2d 871, 875 (9th Cir. 1977); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973). Virtually all of those cases, however, were decided before Congress enacted FISA, and none of them articulates a persuasive basis for distinguishing *Keith*. The only post-FISA case cited by the government in this context is *In re Sealed Case*, in which the Foreign Intelligence Surveillance Act Court of Review suggested the existence of a foreign intelligence exception in dicta, without analysis, and referencing only pre-FISA cases. *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002).

The government also argues that the "special needs" doctrine exempts foreign intelligence surveillance from the warrant requirement. But the special needs exception applies only to a very limited set of circumstances, and none of the rationales used to support a special needs exception apply to intrusive and targeted wiretapping of Americans. For example, the special needs exception has been applied to searches and seizes where the intrusion on privacy is minimal, *see e.g., Terry v. Ohio*, 392 U.S. 1 (1968), or in situations where the individual has a reduced expectation of privacy, *e.g. U.S.*

II. Congressional oversight is of extraordinary importance now because the President continues to claim the authority to violate FISA and because there are serious questions about the lawfulness of the executive branch's ongoing surveillance activities.

a. Recent developments make Congressional oversight especially important.

Only days before the Sixth Circuit heard the government's appeal of the district court's ruling in *ACLU v. NSA*, government attorneys notified the Court that the FISC had issued orders "authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one or the communicants is a member or agent of al Qaeda or an associated terrorist organization."[48] The government stated that, "[I]n light of these intervening FISA Court orders, any electronic surveillance that was occurring as part of the TSP is now being conducted subject to the approval of the FISA Court, and the President, after determining that the FISA Court orders provide the necessary speed and agility to protect the Nation, has determined not to reauthorize the TSP when the current authorization expires."[49]

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v. Martinez-Fuerte, 428 U.S. 543 (1976). However, there is no question that an individual has the greatest expectation of privacy in the content of his or her phone calls and emails.

Additionally, the special needs exception has been applied where "the warrant and probable cause requirement [are] impracticable." *O'Conner v. Ortega*, 480 U.S. 709, 720, 725 (1987) (plurality opinion). Despite many cries that FISA is impracticable, James Baker, who personally ran the FISA application process for the current administration has said in no uncertain terms that the FISA process is fast, efficient and flexible, and many members of Congress briefed on U.S. surveillance activities concur. The fact that the FISA court has denied only a handful of applications out of over 20,000 since its inception in 1978 belies any argument that FISA applications are impracticable.

[48] Gov't Supp. Br. at 1; *see also* Letter from Attorney General Alberto R. Gonzales to Hon. Patrick Leahy and Hon. Arlen Specter (Jan. 17, 2007), *available at* http://www.aclu.org/images/general/asset_upload_file372_28043.pdf.

[49] *Id.* at 2. Again, although the NSA's activities implicate the

Government attorneys, in an attempt to avoid further judicial scrutiny of the President's actions, have urged the Sixth Circuit not to rule on the legality of the NSA's warrantless surveillance activities. But oversight – both by the judiciary and by this Congress – is more important now, not less. As an initial matter, the President continues to claim the authority as Commander in Chief to conduct warrantless surveillance in violation of FISA. As noted above, government attorneys made this claim on behalf of the President in the same brief in which they informed the Court of the January 10, 2007 FISC orders. Senior administration officials have repeated the claim more recently.[50] That the President continues to assert this authority makes Congressional oversight – and the oversight of this Subcommittee – imperative.

In addition, there are serious questions about the legality of the surveillance that is taking place on the authority of the January 10, 2007 FISC orders. The administration's public statements about the orders suggest that the orders may have been obtained after extended negotiations with a single judge of the FISC and that the orders may be programmatic or categorical in nature rather than individualized and particularized, as both FISA and the Fourth Amendment require.[51] In the administration's own words, "These orders are innovative, they are complex, and it took considerable time and work for the Government to develop the approach that was proposed to the Court and for the Judge on the FISC to consider and approve these orders."[52] The letter implies that at the very least, FISA was stretched beyond the original intent of FISA.

Other public statements suggest that the surveillance authorized by the FISC judge may be fraught with legal infirmities. For example, Rep. Heather A. Wilson (R-N.M.) has suggested that the FISC orders may grant some kind of programmatic authorization and do not require the administration to get warrants on a case-by-case basis.[53] Other reports

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communications of innocent U.S. citizens and permanent residents, the government refers to the NSA's warrantless surveillance program as the TSP – the "Terrorist Surveillance Program."

[50] *See supra* note 9.

[51] *See, e.g.*, Letter from the Attorney General to Senators Leahy and Specter, January 17, 2007, *supra* note 48.

[52] *Id.*

[53] Seth Stern, *Justice Officials Leave Lawmakers Confused About New Surveillance Program*, CQ, Jan. 18, 2007.

suggest that the new process may allow the government "to obtain single warrants that cover 'bundles' of wiretaps on multiple suspects" and that the orders may rely on "questionable legal interpretations."[54]

We cannot speculate as to exactly what these new orders look like. We do know that the administration's refusal to even confirm whether particularized orders have been obtained are highly suspicious. Until this Congress obtains concrete information about what the FISC authorized, and the legal rationale supporting it, the administration continues to operate with a largely blank check.

It is worth recalling why Congress enacted FISA in the first place. In the 1960s and 1970s the executive branch engaged in widespread warrantless electronic surveillance of people in the United States, claiming that such surveillance was justified to protect the nation's security. After extensive congressional investigation of these practices by the Church and Pike Committees, the public learned that the Executive had engaged in warrantless wiretapping of numerous United States citizens – including journalists, activists, and members of Congress -- "who engaged in no criminal activity and who posed no genuine threat to the national security."[55] Among the most troubling practices Congress investigated and eventually sought to safeguard against through FISA were certain domestic spying activities by the NSA.[56] To remedy these abuses, Congress enacted FISA. As the Senate Judiciary Committee explained, FISA was meant to "spell out that the executive cannot engage in electronic surveillance within the United States without a prior Judicial warrant."[57]

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[54] Greg Miller, *Strict Anti-Terror Wiretap Rules Urged*, L.A. TIMES, Jan. 24, 2007.

[55] S. REP. NO. 95-604(I), at 6 (1977), reprinted in 1978 U.S.C.C.A.N. 3904, 3909 (quoting Church Committee Report, Book II, 12)

[56] *See, e.g., Intelligence Activities and the Rights of Americans*, Book II, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, United States Senate, S. REP. NO. 94-755, 96 (1976) ("In the late 1960's . . . NSA, acting in response to presidential pressure, turned their technological capacity and great resources toward spying on certain Americans.").

[57] S. REP. NO. 95-604(I), 1978 U.S.C.C.A.N. at 3908; *see also id.* at 3910 (FISA designed "to curb the practice by which the Executive branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it").

b. Congress must compel the administration to release information about the NSA's surveillance activities.

We now know that President Bush authorized the NSA to break the law and that the NSA's unlawful activity was not episodic but rather continuous over a period of approximately five years. We also know, on the basis of testimony from former Deputy Attorney General James Comey, that there were serious concerns about the NSA's surveillance activities even within the Justice Department; that in March 2004 the President reauthorized the NSA's surveillance activities even after Justice Department attorneys informed him that the activities were illegal; and that the President did not narrow the NSA's activities at all until senior Justice Department officials threatened to resign over the issue. And we know, based on the administration's own statements, that the administration's unlawful surveillance activities may continue today – either on the basis of unconstitutional programmatic or categorical warrants issued by the FISC or on the basis of the President's claimed authority to conduct surveillance in violation federal statute.

In spite of all this, this Congress has not issued subpoenas demanding that the administration explain the nature and scope of its surveillance activities. It has not issued subpoenas demanding that the administration disclose the legal opinions on which it has relied. It has not issued subpoenas to the telecommunications corporations that facilitated the administration's unlawful activities. It has not issued subpoenas to determine how the fruits of unlawful surveillance have been used.

In our view, serious Congressional oversight is long overdue. The President's disregard for the law and for the constitutional rights of U.S. citizens and residents should not be permitted to continue. At the soonest possible date, Congress should subpoena all documents relating to warrantless surveillance conducted by the NSA on U.S. soil since September 2001. Such documents would include the legal opinions referenced by former Deputy Attorney General Comey in his May 15, 2007 testimony to the Senate Judiciary Committee. Congress should also subpoena testimony from those officials who initiated, reviewed, authorized, or conducted such surveillance. Recent news reports suggest the possibility that Congress will subpoena former Attorney General Ashcroft;[58] in light of Mr. Ashcroft's central role, Congress should do so immediately.

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[58] Michael Isikoff and Evan Thomas, *Bush's Monica Problem*, NEWSWEEK, Jun. 4, 2007, *available at* http://www.msnbc.msn.com/id/18881810/site/newsweek/; Michael Isikoff, *Calling John Ashcroft*, NEWSWEEK, Jun. 1, 2007, *available at* http://www.msnbc.msn.com/id/18990233/site/newsweek/.

Congress should also subpoena all documents relating to the surveillance orders issued by the FISC – or a judge of the FISC – on January 10, 2007, including internal memoranda discussing the legality of the new program, the FISC orders themselves, all documents submitted by the executive branch to the FISC in connection with those orders, and any subsequent FISC orders reauthorizing, modifying, vacating or otherwise relating to the January 10, 2007 orders.[59] Congress certainly should not enact further legislation in the area of foreign intelligence without determining what surveillance activities the executive branch is engaged in currently.

III. Congress must use its power of the purse to put an end to illegal spying.

Congress's obligation, of course, is not simply to examine the administration's unlawful activities but to ensure that those activities do not continue. To this end, Congress should use this appropriations and authorization cycle to prohibit the use of funds to engage in electronic surveillance that does not comply with FISA or that is conducted on the basis of programmatic or categorical orders rather than the individual and particularized warrants that are required by FISA and the Fourth Amendment to the U.S. Constitution.

The administration's claims that at least the so-called TSP has now been sanctioned by the FISC are of little comfort. It leaves wide open the possibility that other, as of now publicly unknown, warrantless programs continue. And the administration has repeatedly and explicitly stated that it has the authority to resume warrantless surveillance at any time under the President's Article II authority.

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[59] Because the January 10, 2007 FISC orders authorized surveillance activity for 90 days, *see e.g.*, Transcript of Background Briefing by Senior Justice Department Officials (Jan. 17, 2007), *available at* http://www.fas.org/irp/news/2007/01/doj011707.html (Senior Justice Department official stating "the orders are approved by a judge of the FISA court for a period of 90 days"), and because the government filed classified papers with the Sixth Circuit on April 6, 2007, four days before the expected April 10th expiration of the January 10th FISC orders, *see* Notice of Lodging of Classified Submission, *ACLU v. NSA*, Nos. 06-2095/2140 (filed Apr. 6, 2007), the ACLU believes that the FISA court has likely taken some action to extend, vacate, or modify the January 10th FISA order. The ACLU has moved for unsealing of this filing, as well as the government's first secret filing with the Sixth Circuit in January 2007 pertaining to the actions of the FISC.

To stop any illegal or unknown programs, and prevent future ones from being established, this Congress should use the present appropriations cycle to prohibit any funds from being spent on foreign intelligence surveillance that is conducted in the absence of a court order based on particularized suspicion, save for the three narrow exceptions currently written in law. This Congress has not just the authority but the obligation to end the administration's unlawful activities.

IV. Conclusion.

In the late 1970s, the Church Committee conducted a thorough and far-reaching investigation of the executive's surveillance activities, held multiple hearings, issued an exhaustive report, proposed legislation to end unchecked executive surveillance on American soil, and enacted FISA in 1978. The Bush administration's unlawful activities demand an equally strong response from this Congress. Indeed, the current crisis is considerably more serious than the one the nation faced in the 1970s. Then, the executive branch was conducting abusive surveillance in the context of congressional silence. Now, the executive branch conducts abusive surveillance in violation of a congressionally enacted prohibition. Again, it is no overstatement to say that the administration's actions present a challenge to the very foundations of constitutional government. This Congress has an obligation to act.

Mr. NADLER. Thank you.
And Mr. Fisher?

TESTIMONY OF LOUIS FISHER, AMERICAN LAW DIVISION, LIBRARY OF CONGRESS

Mr. FISHER. Thank you, Mr. Chairman. I was encouraged at the start of Chairman Conyers saying that this might be the first step in exploring issues. There are so many questions that we know very little about, and I hope to see a succession of hearings.

My statement starts with a little bit of the history back in the 1960's and 1970's where the Administration was conducting domestic surveillance, and they were conducting it under the same grounds that we talk about today, under the inherent power of the President to take certain actions to protect the American people.

That theory of inherent power was litigated in the Keith case, and both at the District Court level and the Sixth Court level and the Supreme Court level, the court said you don't have that power; you are talking about a power that King George III had, and that is why we had a Declaration of Independence, and that is why we had a war of independence, and that is why we have the fourth amendment. All of this led to the FISA statute in 1978, including a very important judicial check.

The Administration defends the Terrorist Surveillance Program on statutory grounds and constitutional grounds. The statutory ground, namely the Authorization of Use of Military Force, I don't think was ever persuasive. If Congress ever wanted to change FISA or amend it, it does it the way it normally does. It has changed FISA many times. You bring it up. You know what you are talking about. You don't change a law by implication, which is what the argument would be with the AUMF.

As far as the constitutional argument, I would just take one sentence from the January 2006 OLC report, where it said that the policies of the NSA program, "are supported by the President's well-recognized inherent constitutional authority as commander-in-chief and the sole organ for the nation in foreign affairs."

Well-recognized? Maybe it is well-recognized among certain attorneys in the Administration, but it is not well-recognized in the courts. It is not well-recognized in Congress. It is not well-recognized in the academic community.

Inherent? We are all familiar with express powers and implied powers. Those are drawn from the Constitution. The danger with inherent powers is that you don't know where they are being drawn from. Inherent power is an invitation to act outside the law. The claim of inherent powers for the President weakens Congress, weakens the rule of law, weakens democratic government, weakens the system of checks and balances.

Commander-in-chief? You can't take three words from article II and pretend that that is an argument. It is just three words, and you have to understand that commander-in-chief in the context of article I, what that gives to Congress, and other provisions in the Constitution, including the first and fourth amendments.

Sole organ? I hope whenever you see that word "sole organ" in legal analysis you will be suspect about the credibility and honesty of the analysis, because it comes from a speech that John Marshall

gave when he was a Member of the House in 1800, and nothing in John Marshall's statement ever, ever implied anything to do with plenary, exclusive, independent or extra-constitutional presidential powers. It is a misuse of that statement and it is a misuse of where it was later distorted in the 1936 Curtiss-Wright decision.

I talk about briefings and consultations. They are very constructive if you are getting briefed about a program that is legal. If you are getting briefed about a program that is illegal, you are just getting briefed about an illegal program. The briefings do not help that.

The "gang of eight" I think was the wrong procedure. The "gang of eight" is for covert actions. The terrorist surveillance program is not a covert action. What happens when Members of Congress are briefed and you tell the Member that we are briefing you, but you cannot talk to anyone else? You cannot talk with staff who have clearances, et cetera. The executive branch doesn't control Congress. You control yourself. You have to protect your own powers and prerogatives and institutions.

I think the same principle would apply to the FISA Court. I think the fact that you would brief two chief judges in a row, I think was not a good procedure. I think the court knows that Congress by statute provided for a judicial check, and you cannot brief one judge. I think all 11 members of the court should have been briefed, and then they decide what to do. And lastly on briefings, I think the briefings should apply to the Judiciary Committees. You have a special Committee jurisdiction to protect the integrity of FISA.

And last, I just ended on what does "legal" means today because if you hear the Administration say that this is legal, this is authorized, this has been reauthorized, they are not talking about law created by Congress. They are talking about law created by the executive branch. Up to now, we have said that law is made by parliamentary deliberations and that the President is under the law, not above the law. So we have a different system and I think one that deserves that very close scrutiny by Congress.

Thank you.

[The prepared statement of Mr. Fisher follows:]

The Law Library of Congress

Statement by Louis Fisher

Specialist in Constitutional Law

appearing before the
House Committee on the Judiciary

"Constitutional Limitations on Domestic Surveillance"

June 7, 2007

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Mr. Chairman, thank you for inviting me to testify on the constitutional limitations that apply to domestic surveillance. The committee provides an important public service in exploring the issues raised by the "Terrorist Surveillance Program" (TSP), authorized by the administration after 9/11 and conducted by the National Security Agency (NSA). I begin by summarizing what happened in the 1960s and 1970s with domestic surveillance. Two basic points. First: intelligence agencies were willing to violate the Constitution, including the First and Fourth Amendments. Second: federal courts rejected the theory that the President has "inherent" constitutional authority to engage in warrantless domestic surveillance.

I. Lessons of Domestic Surveillance

Illegal eavesdropping by the executive branch surfaced as a prominent issue in the 1960s and 1970s, after it was publicly disclosed that U.S. intelligence agencies had been monitoring the domestic activities of Americans. In 1967, when the U.S. Army wanted the NSA to eavesdrop on American citizens and domestic groups, the agency agreed to carry out the assignment.[1] NSA began to put together a list of names of opponents of the Vietnam War. Adding names to a domestic "watch list" led to the creation of MINARET: a tracking system that allowed the agency to follow individuals and organizations involved in the antiwar movement.[2] NSA thus began using its surveillance powers to violate the First and Fourth Amendments. From mid-1969 to early 1970, the White House directed the FBI to install without warrants 17 wiretaps to eavesdrop on government officials and reporters.[3] Newspaper stories in 1974 revealed that CIA had been extensively involved in illegal domestic surveillance, infiltrating dissident groups in the country and collecting close to 10,000 files on American citizens. CIA Director William Colby later acknowledged the existence of this program while testifying before a Senate committee.[4]

The Huston Plan

On June 5, 1970, President Richard M. Nixon met with the heads of several intelligence agencies, including the NSA, to initiate a program designed to monitor what the administration considered to be radical individuals and groups in the United States. Joining others at the meeting was Tom Charles Huston, a young aide working in the White House. He drafted a 43-page, top secret memorandum that became known as the Huston Plan. Huston put the matter bluntly to President Nixon: "Use of this technique is clearly illegal; it amounts to burglary."[5] His plan, which Nixon approved, directed the

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[1] James Bamford, Body of Secrets: Anatomy of the Ultra-Secret National Security Agency 428 (2002 ed.).
[2] Id. at 428-29; James Bamford, The Puzzle Palace 323-24 (1983 ed.).
[3] Richard E. Morgan, Domestic Intelligence: Monitoring Dissent in America 6 (1980).
[4] Kathryn S. Olmsted, Challenging the Secret Government: The Post-Watergate Investigations of the CIA and FBI 11-12, 35 (1996).
[5] Keith W. Olson, Watergate: The Presidential Scandal That Shook America 16 (2003); Fred Emery, Watergate 25 (1995 ed.); Loch K. Johnson, America's Secret Power: The CIA in a Democratic Society 133-56 (1989).

NSA to use its technological capacity to intercept – without judicial warrant – the domestic communication of U.S. citizens using international phone calls or telegrams.[6]

Under pressure from FBI Director J. Edgar Hoover and Attorney General John Mitchell, Nixon withdrew the Huston Plan.[7] Placed in a White House safe, Huston's blueprint became public in 1973 after Congress investigated the Watergate affair and uncovered documentary evidence that Nixon had ordered the NSA to illegally monitor American citizens.[8] To conduct its surveillance operations under such programs as SHAMROCK (in operation from August 1945 to May 1975), NSA entered into agreements with U.S. companies, including Western Union and RCA Global. U.S. citizens, expecting that their telegrams would be handled with the utmost privacy, learned that American companies had been turning over the telegrams to the NSA.[9]

Judicial Reaction

A 1972 decision by the Supreme Court involved the government's use of warrantless electronic surveillance to prevent what the government feared was an attempt by domestic organizations to attack and subvert the existing structure of government. As the Court framed the issue, it needed to balance both to "the Government's right to protect itself from unlawful subversion and attack" and "the citizen's right to be secure in his privacy against unreasonable Government intrusion."[10]

In district court, defendants prosecuted by the government requested all records of warrantless surveillance directed at them and asked for a hearing to determine whether any of the evidence used to indict them was tainted by illegal actions. The district court held that the warrantless electronic surveillance was not justified on the ground that certain domestic organizations were engaged in subverting the government, and that the government had to make full disclosure to the defendants of illegally monitored conversations. It ordered an evidentiary hearing to determine taint.[11] The court did not accept the government's argument that the Attorney General, "as agent of the President, has the constitutional power to authorize electronic surveillance without a court warrant in the interest of national security."[12] The court expressly rejected the claim of "inherent" presidential power.[13] The President was "still subject to the constitutional limitations imposed upon him by the Fourth Amendment."[14]

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[6] Bamford, Body of Secrets, at 430.
[7] Emery, Watergate, at 26-27.
[8] Bamford, Body of Secrets, at 431-32.
[9] Id. at 438-39; Morgan, Domestic Intelligence, at 75-76. For further details on domestic surveillance during the 1960s and 1970s, see recent testimony by Frederick A. O. Schwarz, Jr., "Ensuring Executive Branch Accountability," before the Subcommittee on Commercial and Administration Law of the House Committee on the Judiciary, March 29, 2007, at 4, 10-11.
[10] United States v. United States District Court, 407 U.S. 297, 299 (1972).
[11] United States v. Sinclair, 321 F.Supp. 1074 (E.D. Mich. 1971).
[12] Id. at 1076.
[13] Id. at 1077.
[14] Id. at 1078 (citing District Judge Ferguson in United States v. Smith, 321 F.Supp. 424, 425 (C.D. Cal. 1971)).

The district court's decision was affirmed by the Sixth Circuit, which examined the government's claim that the power at issue in the case "is the inherent power of the President to safeguard the security of the nation."[15] The Sixth Circuit found that argument unpersuasive, in part because the Fourth Amendment "was adopted in the immediate aftermath of abusive searches and seizures directed against American colonists under the sovereign and inherent powers of King George III."[16] The Constitution was adopted "to provide a check upon 'sovereign' power," relying on three coordinate branches of government "to require sharing in the administration of that awesome power."[17] The Sixth Circuit further noted: "It is strange, indeed, that in this case the traditional power of sovereigns like King George III should be invoked on behalf of an American President to defeat one of the fundamental freedoms for which the founders of this country overthrew King George's reign."[18]

A unanimous ruling by the Supreme Court affirmed the Sixth Circuit. Inherent in the concept of a warrant issued under the Fourth Amendment "is its issuance by a 'neutral and detached magistrate.'"[19] Fourth Amendment freedoms "cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates."[20] Executive officers charged with investigative and prosecutorial duties "should not be sole judges of when to utilize constitutionally sensitive means in pursuing their tasks."[21]

The government advised the Court that the domestic surveillances at issue in this case were directed primarily at collecting and maintaining intelligence about subversive forces, rather than an effort to gather evidence for criminal prosecution. Moreover, the government insisted that courts lacked the knowledge and expertise to determine whether domestic surveillance was needed to protect national security.[22] To the Court, those arguments did not justify departure from Fourth Amendment standards.[23]

Finally, the Court held that Section 2511(3), enacted as part of the Omnibus Crime Control Act of 1968, merely disclaimed congressional intent to define presidential powers in matters affecting national security and did not grant authority to conduct warrantless national security surveillance.[24] The Fourth Amendment required prior judicial approval for the type of domestic security surveillance involved in this case. The Court carefully avoided the question of surveillance over foreign powers, whether within or outside the country.[25]

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[15] United States v. United States Dist. Ct. for E. D. of Mich., 444 F.2d 651, 658 (6th Cir. 1971).
[16] Id. at 665.
[17] Id.
[18] Id.
[19] United States v. United States District Court, 407 U.S. at 316.
[20] Id. at 316-17.
[21] Id. at 317.
[22] Id. at 318-19.
[23] Id. at 320.
[24] Id. at 302-08.
[25] Id. at 302-08.

Congressional Action

The Court's decision in 1972 put pressure on Congress to develop statutory guidelines. In part, Congress responded by setting up the Church and Pike Committees to study the scope of executive branch illegality and propose a system of effective legislative and judicial checks. From those hearings and reports came the creation of new intelligence committees in the House and the Senate to closely monitor the agencies, followed by the landmark Foreign Intelligence Surveillance Act (FISA) of 1978. In congressional hearings, Attorney General Edward H. Levi testified in support of legislation that would require "independent review at a critical point by a detached and neutral magistrate."[26] FISA established a special court, the Foreign Intelligence Surveillance Court (FISC), to assure a judicial check on executive activities and established a Court of Review to hear appeals by the government from FISC denials of applications to engage in electronic surveillance. Moreover, it clearly stated that the procedures of FISA for electronic surveillance within the United States for foreign intelligence purposes "shall be the exclusive means" of conducting such surveillance.

At today's hearing we face issues that were studied extensively and carefully in the 1970s and supposedly remedied by legislation. Once again Congress is in the position of insisting that federal agencies adhere to the rule of law, respect constitutional and statutory limits, and protect fundamental rights of individual privacy and civil liberties.

The balance of my statement focuses on three points: (1) the legal justifications offered by the administration for the TSP; (2) the lack of access by the Judiciary Committees to briefings on the TSP conducted by the executive branch and to records and documents withheld from them; and (3) observations about the implications of the TSP for congressional control, the rule of law, and individual rights and liberties.

II. The Administration's Legal Defense

On January 19, 2006, the Office of Legal Counsel (OLC) in the Justice Department released a 42-page white paper justifying the legality of the TSP.[27] It offered two principal arguments, one statutory, the other constitutional. The first interpreted the Authorization for Use of Military Force (AUMF), enacted after 9/11. The second explored the President's authorities under Article II of the Constitution, with special emphasis on the availability of "inherent" powers.

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[26] "Electronic Surveillance Within the United States for Foreign Intelligence Purposes," hearings before the Subcommittee on Intelligence and the Rights of Americans of the Senate Committee on Intelligence, 94th Cong., 2d Sess. 76 (1976).

[27] "Legal Authorities Supporting the Activities of the National Security Agency Described by the President," Office of Legal Counsel, U.S. Department of Justice, January 19, 2006 (hereafter "OLC Study").

The AUMF

OLC argued that in passing the AUMF "Congress by statute has confirmed and supplemented the President's recognized authority under Article II of the Constitution to conduct such warrantless surveillance to prevent further catastrophic attacks on the homeland."[28] The statute authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorists attacks" of September 11 in order to prevent "any future acts of international terrorism against the United States."[29] To OLC, history "conclusively demonstrates that warrantless communications targeted at the enemy in time of armed conflict is a traditional and fundamental incident of the use of military force authorized by the AUMF."[30]

"All necessary and appropriate force" does not mean whatever the President decides to do, particularly when a selected instrument of force conflicts with statutory law. In FISA, Congress established a set of procedures to be "exclusive" for domestic surveillance. If Congress after 9/11 wanted to modify those procedures and permit the President to engage in national security surveillance without a judicial check, it knows how to amend a statute. Either it brings up the bill in whole to debate changes, with all Members of Congress aware of what they are doing, or adopts a free-standing amendment with FISA clearly and specifically in mind, such as debating language that states: "notwithstanding the provision in Title II, Section 201(b), Subsection (f), of the Foreign Intelligence Surveillance Act, the President is hereafter authorized to engage in the following warrantless surveillance." In floor debate, lawmakers must expressly know that the bill language under consideration covers warrantless surveillance and that the judicial check in FISA is to be waived.

Amendments to statutory law must be explicit and evident, with clear understanding by all lawmakers as to what is at stake. Amendments are not made by implication, with Members unaware of what they are voting on. There is no basis for finding in the debate of the AUMF that Members of Congress understood that they were setting FISA to the side to allow the President warrantless surveillance over domestic matters. It is quite true, as OLC said, that FISA "also contemplates that Congress may authorize such surveillance by a statute other than FISA."[31] Congress is always at liberty to adopt a future statute that modifies an earlier statute. But when it acts it does so expressly and consciously, in full light of the changes made and their significance, not by vague implications. OLC would have Congress legislate in the dark. It is my impression that the administration no longer seriously argues that the AUMF is legal justification for

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[28] Id. at 2.
[29] 115 Stat. 224 (2001).
[30] OLC Study at 2.
[31] Id. For further analysis of the AUMF regarding the TSP, see "Statement of the Constitution Project's Liberty and Security Initiative" (The Constitution Project, Jan. 5, 2006).

the TSP, and that it relies essentially on some form of "inherent" powers under Article II (or perhaps even outside the Constitution).

Inherent Powers

OLC argued that NSA's activities under what became known as the TSP "are supported by the President's well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs to conduct warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States."[32] Let me unpack each of these key words: well-recognized, inherent, Commander in Chief, and "sole organ."

1. Well-recognized? Federal courts have made many observations about the President's powers in foreign affairs and his duty to gather intelligence for national security. Language appears at times in the decisions; just as frequently remarks are made in dicta that is extraneous to the issue before the court. Some rulings encourage a broad reading of presidential power; others are much more restrictive. The record is quite mixed and does not reflect the existence of any settled, "well-recognized" position in the federal judiciary.

The same indefinite position applies to Members of Congress. Some are persuaded of independent and inherent presidential power in foreign affairs; others flatly reject legal doctrines that assert such a sweep of executive authority. There is no "well-recognized" view in Congress regarding the claim that OLC makes. In FISA, in fact, Congress expressly left no room for inherent and independent power by the President to conduct warrantless surveillance.

Similarly, the academic community has never developed a "well-recognized" position on the President's inherent constitutional authority as Commander in Chief to conduct warrantless surveillance. Existing studies demonstrate a wide variety of opinions and judgments.[33]

2. Inherent? Any claim of "inherent" power for the President must be approached with extreme caution and wariness. First, it is only a claim or an assertion, not fact. Second, it has a self-serving motivation, for it comes from the branch claiming the authority. Third, the word has an indefinite and indefinable quality that leaves the door open to illegal, unconstitutional, and extra-constitutional powers. Fourth, there should be heightened concern because the claim of "inherent" authority has been used in recent years to justify military commissions, torture memos, indefinite detention of U.S. citizens designated as "enemy combatants," extraordinary rendition, and the TSP. To

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[32] OLC Study at 1.

[33] E.g., see the March 2007 Special Issue of *Presidential Studies Quarterly*, which is devoted to inherent presidential power (37 Pres. Stud. Q. 1 (2007)); Deciding to Use Force Abroad: War Powers in a System of Checks and Balances (The Constitution Project, 2005); David Gray Adler and Larry N. George, eds., The Constitution and the Conduct of American Foreign Policy (1996); and Gary M. Stern and Morton Halperin, eds., The U.S. Constitution and the Power to Go to War (1994).

appreciate the dangers of "inherent" power, compare three words we use to determine the source of constitution power: *express*, *implied*, and *inherent*.

The first two words preserve and protect constitutional government. Express powers are there in black and white. They can be seen in print and analyzed, usually accompanied by extensive meaning from history and framers' intent. Implied also has a definite quality, because an implied power must be reasonably drawn from an existing express power. For example, the President has an express power to see that the laws are faithfully executed. If a Cabinet official prevents the discharge of a law, the President has an implied power to remove the individual pursuant to his constitutional duty to assure compliance with the law. From the express power to legislate, Congress has an implied power to investigate, issue subpoenas, and hold executive officials in contempt. Express and implied powers are consistent with a constitutional system of limited government.

The same cannot be said of "inherent." The word is defined in some dictionaries as an "authority possessed without its being derived from another. . . . Powers over and beyond those explicitly granted in the Constitution or reasonably to be implied from express powers."[34] If not in the Constitution, either by express or implied powers, what is the source of authority? In other definitions, "inherent" may be a power that "inheres" in an office or position, or something that is "intrinsic" or "belonging by nature."[35] Those concepts are highly ambiguous. The purpose of a constitution is to specify and confine government powers to protect rights and liberties reserved to individuals. That objective is undermined by claims of open-ended authorities (such as "inherent") that are not easily defined or circumscribed. Vague words invite political abuse and endanger individual liberties. In the context of this hearing, claims of "inherent" presidential power directly threaten the prerogatives of Congress. Anything that weakens congressional power weakens democracy and popular sovereignty. The claim of inherent presidential power moves the nation from one of limited powers to boundless and ill-defined executive authority. Such assertions do substantial damage to the doctrine of separation of powers and the crucial system of checks and balances.

3. Commander in Chief? It is analytically meaningless to merely cite three words from Article II as though the case for presidential power is self-evident and needs no further argument. One has to explain what those words mean. Closer scrutiny eliminates any notion of plenary power for the President as Commander in Chief. First, the President is Commander in Chief "of the Militia of the several States, when called into the actual Service of the United States." As is clear from Article I, Congress does the calling. Second, the President is Commander in Chief of the Army and Navy of the United States," but as Article I again demonstrates, Congress has ample authorities to raise and support armies and navies, to make rules for the regulation of the land and naval forces, and to provide for organizing, arming, and disciplining the militia. The

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[34] Louis Fisher, "Invoking Inherent Powers: A Primer," 37 Pres. Stud. Q. 1, 2 (2007).
[35] Id.

appropriations power of Congress is broadly available to direct and limit military operations.[36]

Third, the Constitution does not empower the President as Commander in Chief to initiate and continue wars. Those powers existed for English kings and in the writings of William Blackstone, but the framers deliberately rejected that form of government.[37] Fourth, the President is Commander in Chief for unity of command, but the President's authority to bring unity of purpose in military command does not deprive Congress of its own independent constitutional duty to monitor war and decide whether to restrict or terminate military operations. Fifth, the President is Commander in Chief to preserve civilian supremacy over the military. As explained by Attorney General Edward Bates in 1861, whatever soldier leads U.S. armies "he is subject to the orders of the *civil magistrate,* and he and his army are always 'subordinate to the civil power.'"[38] Congress is an essential part of that civil power. Just as military officers are subject to the direction and command of the President, so is the President subject to the direction and command of Members of Congress as representatives of the sovereign people.

4. "Sole Organ"? In the history of American constitutional doctrines, there is probably nothing as shallow, empty, and misleading as the OLC claim that the President as "sole organ" in foreign affairs is granted some type of exclusive, plenary power. The phrase comes from a speech by Cong. John Marshall in 1800, when he said that the President "is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[39] In his decades of distinguished federal service, as Secretary of State, Member of the House, and Chief Justice of the Supreme Court, Marshall at no time advocated an independent, inherent, or exclusive power of the President over external affairs. The purpose of his speech in 1800 was merely to state that President John Adams had a constitutional duty under the Take Care Clause to see that an extradition treaty with Britain was faithfully carried out. That was all. The context of his speech makes it clear that he was speaking of presidential power to execute *the policy of Congress*, whether expressed in statute or treaty. Marshall never implied any authority of the President to act independent of statutes or treaties, much less in opposition to them. For example, Chief Justice Marshall ruled in 1804 that when a presidential proclamation in time of war conflicts with a statute passed by Congress, the statute prevails.[40]

What OLC does is to take Marshall's speech not as it was given, and not as it was meant, but as it was misinterpreted and distorted by Justice Sutherland in *United States* v. *Curtiss-Wright* (1936).[41] How did Sutherland misuse the speech? First, the case *had nothing to do with presidential power*. It had to do with the *power of Congress* to delegate certain discretionary authority in the field of international affairs. In exercising

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[36] Charles Tiefer, "Can Appropriations Riders Speed Our Exit from Iraq?," 42 Stan. J. Int'l L. 291 (2006).
[37] Louis Fisher, testimony before the Senate Committee on the Judiciary, hearings on "Exercising Congress's Constitutional Power to End a War," January 30, 2007, at 1-4.
[38] 10 Op. Att'y Gen. 74,789 (1861) (emphasis in original).
[39] 10 Annals of Cong. 613 (1800).
[40] Little v. Barreme, 2 Cr. (6 U.S.) 170, 179 (1804).
[41] OLC Study at 1, 6-7, 14, 30

authority given to him in 1934 to impose an arms embargo in South America, President Franklin D. Roosevelt relied solely on statutory – not inherent – authority.[42] Second, Sutherland's misuse of Marshall's speech appears in dicta, not in the decision. Third, the dicta is bad dicta, as has been pointed out repeatedly in scholarly studies. Sutherland promoted misconceptions not only about Marshall's speech but also about the concept of sovereignty, inherent presidential power, extra-constitutional powers, the distinction between internal and external affairs, and the competing powers of Congress.[43] To the extent that *Curtiss-Wright* suggests that foreign affairs are outside the Constitution and not subject to congressional control, the Supreme Court has not followed it.

III. Briefings and Consultation

After 9/11 and the initiation of the TSP, the administration gave regular briefings about the surveillance program to the "Gang of Eight" and to the chief judge of the FISA court. The Gang of Eight includes the leadership of each house and the chair and ranking member of each Intelligence Committee. Lawmakers who were briefed were directed by executive officials not to take notes or share what they heard with colleagues or with their staff. Not being part of the Gang of Eight, the Judiciary Committee chairmen and ranking members were not briefed as part of this process. Several issues emerge.

First, it is constructive for the executive branch to brief and consult Members of Congress *provided that the program is legal, constitutional, and in harmony with statutory law.* Briefing Members about an illegal program does not make it legal. It would be as though executive officials briefed the chair and ranking member of the two Appropriations Committees that funds had been withdrawn from the Treasury without an appropriation. With or without the briefing, the action would be unconstitutional.

Second, was the Gang of Eight the proper procedure to follow? My understanding of the Gang of Eight is that it was established as a means of informing the congressional leadership and the top levels of the Intelligence Committees about a pending *covert action* (50 U.S.C. Section 413b(c)(2)), which is an activity "to influence political, economic, or military conditions abroad" (50 U.S.C. Section 413b(e)). In my judgment, the Gang of Eight was not the right procedure to brief members about the TSP, which has nothing to do with destabilizing or altering a foreign country.

Third, what duty falls on a member of the Gang of Eight in being briefed about a program that waives FISA and dispenses with independent judicial checks? Are they bound by some vow of secrecy insisted on by the executive officials doing the briefing? No. Members of Congress who receive confidential briefings from executive officials belong to a separate branch with separate institutional responsibilities, including the duty to assure that the executive branch complies with the law. After being briefed, lawmakers may reach out to colleagues, top staff, and to the leadership of the Judiciary

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[42] 48 Stat. 1745 (1934).

[43] Louis Fisher, "Presidential Inherent Power: The 'Sole Organ' Doctrine," 37 Pres. Stud. Q. 139 (2007). For more detailed analysis, see Louis Fisher, "The 'Sole Organ' Doctrine," The Law Library of Congress, August 2006.

Committees to receive their legal and constitutional analysis. Members of Congress take an oath to the Constitution, not to the President. They have a special obligation to protect the powers of their institution.

Fourth, what duty falls on a chief judge of the FISA Court after being briefed about a program that waives FISA and dispenses with independent judicial checks? The primary duty of the chief judge is not to remain silent but to inform the other ten judges on the Court. They must then decide what to do, because it is their duty to see that the law is obeyed, including the judicial check that Congress placed in FISA.

Fifth, the Judiciary Committees (at least the chairmen and ranking members) needed to be informed about the TSP because of their jurisdiction over FISA. Generally speaking, the Intelligence Committees will focus more on policy and programmatic issues, while the Judiciary Committees will place greater emphasis on legal and constitutional issues and the integrity of FISA.

IV. What Does "Legal" Mean Today?

NSA's surveillance program raises elementary questions about the constitutional duty of Congress to make law. In the Steel Seizure Case of 1952, Justice Robert Jackson eloquently summarized our constitutional principles: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."[44] Simple words but so profound. The Executive is under the law, not above it. The law is made by Congress.

The TSP represents a direct challenge to our system and form of government. Under the guise of "inherent" power, the executive branch claims the right to ignore statutory law in order to give preference to executive-made law, all done in secret. Other countries have adopted this approach, at great cost to democratic institutions and individual rights.

Independent Executive Law?

On December 17, 2005, after the *New York Times* published the story about the NSA eavesdropping program, President Bush in a radio address acknowledged that he had authorized the agency to conduct the surveillance, "consistent with U.S. law and the Constitution."[45] In subsequent statements, as President Bush continued to refer to "U.S. law" or "authority," it appeared that he meant law created solely within the executive branch, even if contrary to a law passed by Congress. He underscored his independent Article II constitutional powers: "The authorization I gave the National Security Agency after Sept. 11 helped address that problem [of combating terrorism] in a way that is fully consistent with my constitutional responsibilities and authorities."[46] He said he had

[44] Youngstown Co. v. Sawyer, 343 U.S. 579, 655 (1952).
[45] "Bush on the Patriot Act and Eavesdropping," New York Times, Dec. 18, 2005, at 30.
[46] Id.

"reauthorized this program more than 30 times since the Sept. 11 attacks."[47] Similarly, on December 19 Attorney General Alberto Gonzales stated that "the President has the inherent authority under the Constitution, as Commander-in-Chief, to engage in this kind of activity."[48]

Michael V. Hayden appeared before the Senate Intelligence Committee on May 18, 2006, to testify on his nomination to be CIA Director. Previously he had served as NSA Director at the time the TSP was initiated. At the hearing, he defended the legality of the program on constitutional, not statutory, grounds. In recalling his service at NSA after 9/11, he told the committee that when he talked to NSA lawyers "they were very comfortable with the Article II arguments and the president's inherent authorities."[49] When they came to him and discussed the lawfulness of the program, "our discussion anchored itself on Article II."[50] The attorneys "came back with a real comfort level that this was within the president's authority [under Article II]."[51]

This legal advice was not put in writing and Hayden "did not ask for it." Instead, "they talked to me about Article II."[52] What could the talk have been about? The President as Commander in Chief? What other words in Article II would have clarified the legal analysis and produced a comfort level? Apparently the NSA General Counsel was not asked to prepare a legal memo defending the TSP. No paper trail. No accountability. Just informal talks. We all know that hallway discussions about legal and constitutional issues are not likely to look as persuasive or as sound when put on paper and submitted to peers for their independent assessment.

During the hearing, Hayden repeatedly claimed that the NSA program was legal and that in taking charge of the CIA the agency "will obey the laws of the United States and will respond to our treaty obligations."[53] Given what he said throughout the hearing, what did he mean by "law"? A policy drawn solely from within the executive branch, depending on someone's interpretation of Article II? That appears to be what he meant. After 9/11, while at NSA, he said he "had two lawful programs in front of me, one authorized by the president [the TSP], the other one would have been conducted under FISA as currently crafted and implemented."[54] In other words, he had two choices: one authorized by the President, the second authorized by Congress. He selected the former. He told one Senator: "I did not believe – still don't believe – that I was acting unlawfully.

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[47] David E. Sanger, "In Address, Bush Says He Ordered Domestic Spying," New York Times, Dec. 18, 2005, at 30.

[48] Press briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, at 2. Available from http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html

[49] Hearing of the Senate Select Committee on Intelligence on the Nomination of General Michael V. Hayden to be Director of the Central Intelligence Agency, May 18, 2006, transcript, at 35.

[50] Id.

[51] Id. at 69.

[52] Id.

[53] Id. at 74.

[54] Id. at 88.

I was acting under a lawful authorization."[55] He meant a presidential directive issued under Article II, even if in violation of the exclusive policy set forth in FISA.

Hearing him insist that he was acting legally in implementing the NSA program, a Senator said: "I assume that the basis for that was the Article II powers, the inherent powers of the president to protect the country in time of danger and war." Hayden replied: "Yes, sir, commander in chief powers."[56] Hayden seemed to clearly imply that he was willing to overstep statutory law in order to carry out presidential law. After 9/11, CIA Director George Tenet asked whether NSA could "do more" to combat terrorism with surveillance. Hayden answered: "not within current law."[57] In short, it appears that the administration knowingly and consciously decided to act against statutory policy. It knew that the NSA eavesdropping program it decided to conduct was illegal under FISA but decided to go ahead, banking on Article II powers.

At one point in the hearings, Hayden referred to the legal and political embarrassments of NSA during the Nixon administration, when it conducted warrantless eavesdropping against domestic groups. In discussing what should be done after 9/11, he told one group: "Look, I've got a workforce out there that remembers the mid-1970s." He asked the Senate committee to forgive him for using "a poor sports metaphor," but he advised the group in this manner: "since about 1975, this agency's had a permanent one-ball, two-strike count against it, and we don't take many close pitches."[58] TSP was a close pitch. If Congress learns more about the program, we may learn if NSA hit or missed.

Continued Reliance on Article II

In January 2007, after several setbacks in the federal district courts on the TSP, the administration announced it would no longer skirt the FISA Court but would instead seek approval from it, as required by statute. Exactly what "orders" the FISA Court issued is unclear, because they have not yet been released to Congress. The announcement seemed to promise compliance with FISA, but there is insufficient information to know what the new policy is or how permanent it is.

Was the administration now relying solely on statutory authority or had it kept in reserve its Article II, inherent power arguments? Had the administration merely offered a temporary accommodation while keeping the door open to Article II claims? At oral argument on January 31, 2007 before the Sixth Circuit, regarding one of the TSP cases, one of the judges asked the government: "You could opt out at any time, couldn't you?" The Deputy Solicitor General acknowledged the possibility.[59]

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[55] Id. at 138.
[56] Id. at 144
[57] Id. at 68.
[58] Id. at 61.
[59] Adam Liptak, "Judges Weigh Arguments in U.S. Eavesdropping Case," New York Times, Feb. 1, 2007, at A11.

At a May 1, 2007 hearing before the Senate Intelligence Committee, the administration seemed to promote Article II. Michael McConnell, the Director of National Intelligence, signaled that the administration might not be able to keep its pledge to seek approval from the FISA Court. When asked by Senator Russ Feingold whether the administration would no longer sidestep the FISA Court, McConnell replied: "Sir, the president's authority under Article II is in the Constitution. So if the president chose to exercise Article II authority, that would be the president's choice." McConnell wanted to highlight that "Article II is Article II, so in a different circumstance, I can't speak for the president what he might decide."[60]

We're back to basics: Who makes law in the national government? If Congress passes a law through the procedures specified in Article I, is the President obliged under Article II to "take Care that the Laws be faithfully executed"? Alternatively, is the President at liberty to craft – in secret – an executive-made law that supplants and overrides statutory law? These hearings will help Congress and the public take part in an all important debate on what constitutes "the rule of law" in America. It has been our foreign policy to support and encourage the rule of law abroad. Shall we also have it here at home?

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[60] James Risen, "Administration Pulls Back on Surveillance Agreement," New York Times, May 3, 2007, at A16.

Mr. NADLER. Thank you.

I recognize myself for 5 minutes.

Mr. Bradbury?

Mr. BRADBURY. Yes, sir.

Mr. NADLER. [off-mike] 15-day opening window to act during times of war. Was the TSP or any other surveillance program outside the scope of FISA in place prior to the authorization for the use of military force?

Mr. BRADBURY. No.

Mr. NADLER. Okay.

Mr. BRADBURY. It began in October of 2001.

Mr. NADLER. And when was the legal opinion for this authority issued?

Mr. BRADBURY. The President was advised that it was lawful before the program began.

Mr. NADLER. After the authorization, at what point after the expiration of the 15 days did the President revert to his authority under FISA?

Mr. BRADBURY. I am not sure I understand the question. The 15 days, Mr. Nadler, does not apply. It applies only when there is a declaration of war. Section 111 of FISA——

Mr. NADLER. So you are not explaining the 15-day——

Mr. BRADBURY. That is correct. I would say, and I will try to be brief, that the 15-day provision in section 111 of FISA in our view does not say you only get 15 days——

Mr. NADLER. You don't have to get a warrant for 15 days.

Mr. BRADBURY. But it does not purport to mean that Congress made a judgment that you only need 15 days of authority during time of war to commence surveillance.

Mr. NADLER. No, the expectation when that was passed was that you have 15 days to go to Congress if you thought you needed more authority to act without warrants.

Mr. BRADBURY. And in our view, the authorization for the use of military force was an act of Congress that did give that authority.

Mr. NADLER. Which gives the President limitless authority?

Mr. BRADBURY. Not limitless.

Mr. NADLER. But authority to act without warrants?

Mr. BRADBURY. All necessary and appropriate authority to repel the threat, and to prevent attack.

Mr. NADLER. And that means that as long as we are fighting the war on terror, the President can have surveillance of Americans he believes to be in communication with al-Qaida in the United States without getting warrants from a FISA Court?

Mr. BRADBURY. It does not mean that.

Mr. NADLER. What does it mean?

Mr. BRADBURY. The authorization is still in effect and does still give authority to the President, but anything the President does has to be consistent with the Constitution; has to be consistent with——

Mr. NADLER. But under your interpretation of the Constitution's inherent article II powers, he can wiretap people without a warrant from the FISA Court.

Mr. BRADBURY. It all depends on the circumstances at a given time. The fourth amendment has very real application here. Any

surveillance has to be reasonable under the fourth amendment. That takes into account all the conditions and circumstances at the time, and the nature of the surveillance that you are talking about.

For example, Mr. Chairman, if the President wanted to reauthorize the Terrorist Surveillance Program today, my view is it would require a new legal analysis, a new judgment based on all the current circumstances.

Mr. NADLER. Okay. And he has done that 45 times?

Mr. BRADBURY. I don't know about the exact number. It was every 45 days, approximately.

Mr. NADLER. I am sorry—every 45 days he has done it.

When was the first discussion after 9/11 with members of the department about undertaking electronic surveillance outside FISA?

Mr. BRADBURY. Again, our view is that the surveillance of this program is consistent with FISA, Mr. Chairman.

Mr. NADLER. No, I think what you have said is that your view is that under the President's inherent power and under AUMF, it supersedes FISA, not that it is consistent with FISA.

Mr. BRADBURY. I think there have been some rather extravagant claims about what our argument is. Our argument is primarily that you need to read the authorization for the use of force consistent with FISA to harmonize them. There is a provision in FISA that says——

Mr. NADLER. Wait a minute. That doesn't make any sense. FISA says you can wiretap people in the United States with a warrant. I have always understood you to say that under the AUMF and under the President's inherent power, you don't need to obey that provision of FISA. Correct?

Mr. BRADBURY. I am sorry. FISA doesn't say "with a warrant." FISA orders are not necessarily warrants.

Mr. NADLER. Excuse me. You need a FISA order. Never mind the nomenclature, you need a FISA order. Your claim is that under the AUMF and under inherent power of the President, you don't need a FISA order.

Mr. BRADBURY. FISA says "except as otherwise authorized by statute." AUMF is a statute.

Mr. NADLER. Correct. And AUMF being a statute, your interpretation is that AUMF supersedes FISA.

Mr. BRADBURY. No, it doesn't supersede FISA. FISA says "except as otherwise authorized by statute," so it is consistent with FISA.

Mr. NADLER. All right. We are playing word games.

Mr. BRADBURY. I think it is very fundamental.

Mr. NADLER. We are playing word games.

Your claim is that under the AUMF, AUMF authorizes the surveillance without a FISA order and that that is consistent with FISA.

Mr. BRADBURY. Correct.

Mr. NADLER. Okay. I would say that that means it supersedes FISA. It doesn't matter.

In an October 2001 OLC opinion regarding presidential power, referred to in the August 2002 so-called "torture memo," was that October 2001 opinion part of the consideration by the department of the legality of electronic surveillance?

Mr. BRADBURY. I am not sure of the exact opinion that you are referring to. I would say there are opinions from the office regarding this program.

Mr. NADLER. The Congress has repeatedly asked for copies of the OLC opinion. Will you furnish copies of those opinions to the Committee?

Mr. BRADBURY. No, Mr. Chairman.

Mr. NADLER. Why not?

Mr. BRADBURY. Because those reflect the internal confidential legal advice of the executive branch. Those are deliberative——

Mr. NADLER. What privilege are you asserting?

Mr. BRADBURY. I am not asserting a privilege.

Mr. NADLER. Then how can you not give it to the Committee upon request? Either you assert a privilege or you give it to us, one or the other.

Mr. BRADBURY. No. Mr. Chairman, we respond to all requests from the Committee. If the Committee makes a request for the document, we——

Mr. NADLER. We have made such a request.

Mr. BRADBURY. And I believe we responded and explained——

Mr. NADLER. By saying you won't give it to us.

Mr. BRADBURY [continuing]. That the confidentiality interests of the department——

But we have done something that is rather extraordinary, and that is we prepared in January of 2006 a very extensive white paper for the purpose of explaining to the Congress and to——

Mr. NADLER. That is very nice, but it doesn't give us what we requested, which is those legal opinions. Unless you are asserting a privilege, there is no alternative. What privilege are you asserting?

Mr. BRADBURY. We are citing the confidentiality interests that the executive branch has in internal confidential deliberative advice of the executive branch.

Mr. NADLER. So that is executive privilege you are asserting.

Mr. BRADBURY. I don't assert executive privilege, Mr. Chairman. The President asserts executive privilege.

Mr. NADLER. So you just stated that the President exerted executive privilege, then.

Mr. BRADBURY. I stated that there are important confidentiality interests with respect to internal advice, and those——

Mr. NADLER. Isn't that the issue of executive privilege?

Mr. BRADBURY. No, it isn't. Those are the types of interests that would support if necessary an assertion of executive privilege by the President. That is something we like to try to avoid, and we have not done that here.

Mr. NADLER. So you are saying you won't give to Congress the requested documents because they deserve executive privilege which you haven't yet asserted.

Mr. BRADBURY. They do partake of the confidentiality interests of the executive branch. That is an interest that could support an assertion of executive privilege.

Mr. NADLER. All right. Let me stop playing this game. Has any part of the October 2001 OLC opinion been withdrawn, modified or clarified in any way since then? If so, what are the changes?

Mr. BRADBURY. I am not going to discuss the internal legal deliberations of the department.

Mr. NADLER. Did the Department of Justice Office of Legal Counsel issue an opinion or more than one opinion concerning electronic surveillance?

Mr. BRADBURY. The Department of Justice Office of Legal Counsel has reviewed the legality of the program and has reviewed it more than once.

Mr. NADLER. Are any part of such opinions currently classified?

Mr. BRADBURY. All such opinions are currently classified.

Mr. NADLER. Okay. I see my time has expired. Thank you.

Mr. BRADBURY. Thank you.

Mr. NADLER. We have 6 minutes. The Ranking Member is correct. I will violate what I said before. We will recess for 6 minutes to go and vote, and we will resume.

Please, there are two votes. I ask the Members as soon as you can catch the second vote, please return here. Please return here and we will resume in about 12 minutes.

Thank you.

[Recess.]

Mr. NADLER. The Committee will come back to order.

I would normally ask the Ranking Member to ask questions, but we will come back to him since he is not here yet.

In accordance with the policy, I will now recognize the distinguished Chairman of the full Committee, the gentleman from Michigan, Mr. Conyers, for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

I wanted to thank Mr. Fein, Mr. Jaffer and Dr. Fisher for their very excellent explanations of the statutory and constitutional basis of why we are here today.

And so, do any of you have any reason to believe that the Administration can deny the Committee access to executive branch opinions about the legality of the TSP program or its current revisions?

Mr. FEIN. I think not, Mr. Conyers. Let me elaborate.

Mr. CONYERS. Please.

Mr. FEIN. There is certainly an exceptionally compelling interest in the Congress in determining whether or not perhaps a criminal violation of FISA has occurred since 9/11. The statute makes criminal only those things that are done intentionally. It is a vital interest for this Committee, therefore, to know what legal advice was being given to those in authority to order the National Security Agency to circumvent FISA.

Moreover, I think the history of executive privilege shows that it would hardly be a crippling of the executive branch to require the disclosure of this kind of communication to the Congress. It has been done regularly with regard to Supreme Court nominees or even lower court nominees, where it was thought important in examining the philosophy of a nominee, what kind of advice was given the solicitor general or otherwise.

I can recall in my own experience serving as counsel on the Iran-Contra Committee that President Reagan had given authority for the national security advisers to give blow-by-blow accounts as to the advice concerning the sale of arms to Iran and the diversion of

funds to the so-called "Contras." That testimony was forthcoming. It did nothing to cripple the executive branch.

The main argument that is advanced, I think, by Mr. Bradbury or tacitly, is, well, if this is disclosed in this compelling interest where you need to determine whether a crime has been committed, no one will be candid in their legal opinions. History, I think, discredits that.

The last thing I would say is at least the prevailing Supreme Court opinion on this issue indirectly, *U.S. v. Nixon,* which says even presidential communications can be forced to be disclosed in the context of a criminal investigation conducted by a grand jury, which strongly suggests if the Congress is similarly investigating that seriousness of wrongdoing in the executive branch, then even presidential communications would be forth coming, a fortiori, legal advice within the Justice Department.

Mr. CONYERS. Yes. Very good.

Dr. Fisher, adding to the same question, the notion that the Chairman, myself, and the Ranking Member, Mr. Lamar Smith, we could be briefed, but everybody else on the Committee shouldn't be briefed. I don't get it. We are all cleared for top secret. What is the difference?

Mr. FISHER. I don't understand the Administration's position. I think you operate as a Committee. You have to legislate as a Committee. You don't do it by Chair and Ranking, so everyone on the Committee is cleared and they have a need to know what it is in case they have to legislate on it.

Mr. CONYERS. Exactly right.

Mr. Jaffer, what would you add to this discussion?

Mr. JAFFER. First, I think all of that is exactly right, Mr. Conyers. The only thing that I want to stress is to the extent that Government is relying on the AUMF, the authorization for use of military force, as authority for its actions, I think that that reliance is completely misplaced. First, as I said earlier, there is no textual basis for the argument that the AUMF was meant to authorize domestic surveillance.

Second, many Members of Congress have come out on both sides of the aisle to say that they never meant to authorize domestic surveillance when they authorized the AUMF. And then finally, the Administration has relied on *Hamdi,* the Supreme Court's decision in *Hamdi,* but *Hamdi* involved the detention of enemy combatants on the battlefield. That is a completely different situation than what we are dealing with here, which is a program of surveillance inside the United States directed at U.S. citizens and U.S. residents.

Mr. CONYERS. Exactly.

Dr. Fisher, finally?

Mr. FISHER. Yes, just to add to what Bruce Fein said about the deliberative process, Mr. Bradbury is correct that there is much going on inside the executive branch that is part of the deliberative process, but you are not asking about the deliberative process. You are asking for the final legal judgment to justify a program. As we all know, OLC regularly publishes its opinions when there is a question. After the New York Times story about the legality of it,

you know, in January 2006, OLC quickly got out their 42-page white paper.

So I don't understand any reason why a legal analysis, a final legal analysis, not the interim one, the final one shouldn't be made available to Congress and the public.

Mr. CONYERS. Chairman Nadler and I are still waiting for a response of any kind from the Attorney General Alberto Gonzales about this subject matter since May 17th. In our generosity of spirit, we are going to give him 2 more weeks, and then, as somebody said, it is about time process kicks in somewhere around here.

Thank you, Mr. Chairman.

Mr. NADLER. Thank you.

I now recognize for 5 minutes the distinguished Ranking Member of the Subcommittee, Mr. Franks.

Mr. FRANKS. Thank you, Mr. Chairman.

Mr. Chairman, I might make just a couple of observations here before I ask questions.

I think it was Mr. Fein that suggested that there were many things unknown to Congress and certainly this program was known but to a few Members of Congress. In my judgment, the correct Members of Congress knew about it. This is the type of program that because of the national security implications is important to keep that from the general public. But for the New York Times, we wouldn't know about this. I would only suggest to you that but for the New York Times, perhaps terrorists wouldn't know about it either.

I also think Mr. Fein indicated that the NSA surveillance program would not reach someone like Osama bin Laden, that it would not be relevant in that case in a cave somewhere in Tora Bora or wherever it might be. But would that be unless he had a cell phone or a working satellite phone? Certainly, something like this could have profound implications in that regard. This is what the whole idea is here is to intercept phone calls and conversations just like that from those who are trying to maintain their secrecy. I just wanted to point those two things out. Sometimes it seems important.

Mr. Bradbury, could I ask you, sir, ever since the Supreme Court decided the Keith case, both before and after the enactment of FISA all Federal appellate courts that have squarely confronted the issue have found that the President is constitutionally empowered under article II to conduct warrantless electronic surveillance when he deems it necessary to protect the Nation from external threats.

The rationale was articulated by the Fifth Circuit Court in *United States v. Brown,* decided a year after the Supreme Court case of the Keith case. And this is their quote: "Because of the President's constitutional duty to act for the United States in the field of foreign relations and his inherent power to protect national security in the context of foreign affairs, we affirm that the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence. Restrictions upon the President's power which are appropriate in cases of domestic security become artificial in the context of the international sphere. This principle is buttressed by a thread that runs throughout the

Federalist papers that the President must take care to safeguard the nation from possible foreign encroachment, whether in its existence as a nation or in its intercourse with other nations."

To your knowledge, Mr. Bradbury, are there any higher judicial precedents that directly hold otherwise?

Mr. BRADBURY. Not directly, no.

Mr. FRANKS. Can anyone on the panel suggest that there were any court case or any higher judicial precedent that would hold other than what I just read from the Supreme Court?

Mr. FEIN. Yes, I would.

Mr. FRANKS. Yes, sir?

Mr. FEIN. I would suggest that the separation of powers doctrine announced by the United States Supreme Court in *Youngstown Sheet and Tube v. Sawyer* made quite clear——

Mr. FRANKS. Confronting this issue directly, Mr. Fein, not indirectly.

Mr. FEIN. They did not confront intelligence collection in that particular direction, but certainly they announced a doctrine that was equally applicable. They didn't say the doctrine of separation of powers makes a difference depending upon whether you seize a steel mill or whether you intercept foreign communications in violation of a Federal statute. The basis doctrine stays undisturbed.

Mr. FRANKS. Well, let me just for the fun of it, I am going to read the court's language again so that we can be sure that indeed the court did address foreign intelligence gathering, which is what the subject of the case here is today.

We are not talking about steel mills, and I am not sure I have time, but this is their language: "Because of the President's constitutional duty to act for the United States in the field of foreign relations and his inherent power to protect national security in the context of foreign affairs, we affirm the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence." I will stop there.

It seems very clear to me if there is no case that overturns that, that the President is on strong footing. I am probably going to go ahead and yield back here because I am about out of time, but thank you all for coming.

Mr. NADLER. I thank the gentleman.

I am going to ask unanimous consent to grant myself 30 seconds to ask a question.

Number one, isn't it true that the *Truong* case that you quoted dealt with developments prior to enactment of the FISA Act, number one?

And number two, isn't it true that the FISA Act deals not with foreign intelligence, but with intelligence conducted in the United States, and therefore what the Ranking Member was talking about was not really on point, Mr. Fein?

Mr. FEIN. That is accurate.

Mr. NADLER. Thank you.

Mr. FEIN. Moreover, the doctrine is very clear and accepted by the United States Supreme Court that the President's powers inherent to gather foreign intelligence are reduced to the extent Congress makes a regulation. That is the clear teaching of *Youngstown*

Sheet and Tube and Justice Jackson's concurring opinion which is accepted as controlling law.

Mr. NADLER. I thank you. I just yielded myself 30 seconds with unanimous consent. I am not getting recognized.

Mr. FRANKS. With unanimous consent, could I respond for 30 seconds?

Mr. NADLER. Well, yes, but before you do, I will ask Mr. Fisher, who wanted to answer my question to answer my question, too, and then I will yield to you.

Mr. FISHER. I just want to make the point that the *Brown* case was 1973, and I think there is a big difference when Congress has not acted.

Mr. NADLER. That predates FISA?

Mr. FISHER. That predates pre-FISA, there are certain cases that recognize Congress hasn't spoken. Once Congress speaks in 1978, I think the constitutional issue shifts.

Mr. BRADBURY. Mr. Chairman, may I make a point?

Mr. NADLER. Yes.

Mr. BRADBURY. It is absolutely correct that the courts of appeals cases directly on-point dealt with conduct that occurred prior to the enactment of FISA, including the *Truong* case. It was decided after the enactment of FISA.

Mr. NADLER. A few days after.

Mr. BRADBURY. Yes, the *Truong* case in the Fourth Circuit. The *Truong* case did focus on what the court viewed as the inappropriateness or the mismatch of having a judicial proceeding overseeing the President's exercise of foreign intelligence authority. So it did recognize a mismatch there.

I guess the other point I would make is that the Supreme Court in the *Keith* case expressly—and I know Dr. Fisher referenced the *Keith* case—included a footnote in that case in which it made clear it was not addressing exercise of the President's authority with respect to foreign intelligence surveillance. FISA does deal with foreign intelligence.

Mr. NADLER. Within the United States.

Mr. BRADBURY. Well, it has a complicated definition of "electronic surveillance," It can encompass surveillance even when you are focusing on foreign persons overseas.

Mr. NADLER. Okay, we are abusing my 30 seconds now.

Mr. BRADBURY. Thank you.

Mr. NADLER. I will now grant the Ranking Member 1 minute, with unanimous consent.

Mr. FRANKS. Mr. Chairman, I am not sure that I can improve on Mr. Bradbury's explanation, but I do think that a constitutional ruling is not trumped by the statute in the first place, even if the points were correct. Thank you.

Mr. NADLER. Thank you.

I now yield to the gentleman from North Carolina for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman.

In addition to the three witnesses that Mr. Conyers thanked, I want to thank the other two also because I am appreciative to all of you for being here to testify about something that there has been a tug-of-war about for a long time, I suppose. And that is the whole concept of who has power. I didn't deal with this concept very much

before I came to Congress, but power is interesting, and most people don't concede power to anybody.

We do know that our Nation was founded on the concept of separation of powers to dilute and balance power. So I obviously and unapologetically err on the side of balancing powers regardless of who is asserting it. Otherwise, we have a dictatorial government in some respects, which I take it may be what the President is asserting in this area, and in some areas he has gone in that direction, too, but that is a subject of another day.

Mr. Bradbury, I note that you are the principal deputy assistant attorney general. Did you hold that position under Mr. Ashcroft, Attorney General Ashcroft also, or any position in the Justice Department?

Mr. BRADBURY. Yes, I did.

Mr. WATT. Okay.

Mr. Comey, former Deputy Attorney General Comey, testified before this Committee a couple of weeks ago in a different context, about a meeting that took place in the hospital when Attorney General Ashcroft was in the hospital, and testified that he, Deputy Attorney General Comey, Attorney General Ashcroft, and FBI Director Robert Mueller concluded that the NSA's program did not comply with the law.

Mr. Bradbury, would you affirm that or refute that that happened? Did Mr. Ashcroft take the position that some aspects of this program did not comply with the law?

Mr. BRADBURY. Congressman, I am not in a position to confirm the testimony that Mr. Comey gave.

Mr. WATT. I am not asking you to confirm the testimony. I am asking you to confirm whether or not former Attorney General Ashcroft expressed reservations, legal reservations about some aspects of the surveillance program.

Mr. BRADBURY. I think, Congressman, that the attorney general has made it clear that——

Mr. WATT. I would think a yes or no answer to that would suffice. I mean, I am happy to have you elaborate, but either he did question some aspects of this or he didn't question them. That is either yes or no, and then I am happy to have you explain. I am not trying to cut you off, but I don't want you to rope-a-dope me for 5 minutes explaining something that is not an answer, too.

Mr. BRADBURY. As I think we have tried to be clear and careful about——

Mr. WATT. Mr. Bradbury, did former Attorney General Ashcroft express legal reservations about some aspects, whatever they were—I am not even going to get into that—of this surveillance program?

Mr. BRADBURY. Congressman, the attorney general has indicated that, as you might expect with complicated national security matters, disagreements arose about aspects of intelligence activities, the details of operations, and intelligence activities that are not public, that remain highly classified.

Mr. WATT. I am not asking you to make anything public. I am asking you, does that mean that the former attorney general had some legal reservations about some aspect of the program, Mr. Bradbury?

Mr. BRADBURY. Well, all I will say is what the attorney general has said, which is that disagreements arose. Disagreements were addressed and resolved. However, those disagreements were not about the particular activities that the President has publicly described, that we have termed the terrorist surveillance program.

Mr. WATT. Did former Attorney General Ashcroft refuse to sign whatever this certification of legality that was presented to him at the hospital, as far as you know, Mr. Bradbury?

Mr. BRADBURY. I am sorry. I am not at liberty to talk about internal disagreements or deliberations.

Mr. WATT. You are before this Committee. Are you asserting some kind of privilege? What are you doing other than saying "I don't want to answer the question," Mr. Bradbury?

Mr. BRADBURY. I am referring to again, Congressman, to the interests that the department and the executive branch have in the confidential internal advice and deliberations of the executive branch.

Mr. WATT. Okay. Well, what effect, Mr. Fein, Mr. Fisher, would a certification by the Department of Justice have on the legality of an electronic surveillance program that violated the FISA statute?

Mr. NADLER. The gentleman's time has expired, but I will ask the witnesses to answer the question briefly.

Mr. FEIN. The certification cannot make something that is illegal legal, but I do think the question indicates the importance of a response by Mr. Bradbury, because insofar as you are examining in good faith of the executive branch and operating outside FISA, you need to know what advice was given within that branch.

It seems to me preposterous that this Committee, and you are the representatives of the people, people who have a democracy where openness is the rule, sunshine is the best disinfectant, are kept unknowing as to exactly what was given advice in this highly sensitive situation.

Mr. FISHER. Yes, I would say certification is just the last result. All you know is that they certified it. You don't know why they certified it. So I think you have to get the legal reasoning down on paper so that you know what was considered by the department in authorizing this program.

Mr. WATT. Thank you, Mr. Chairman. I yield back.

Mr. NADLER. I thank the gentleman.

And I thank all our witnesses.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward. And I ask the witnesses to respond as promptly as you can, so that the answers may be part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

With that, I thank the witnesses again.

I thank the Members.

And the hearing is adjourned.

Mr. BRADBURY. Thank you, Mr. Chairman.

[Whereupon, at 4:02 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

RESPONSE FROM BRIAN A. BENCZKOWSKI, PRINCIPAL DEPUTY ASSISANT ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, IN RESPONSE TO POST-HEARING QUESTIONS SUBMITTED BY THE SUBCOMMITTEE

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 4, 2007

The Honorable Jerrold Nadler
Chairman
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the June 7, 2007, appearance before the Subcommittee of Steven G. Bradbury. The subject of the hearing was "Constitutional Limitations on Domestic Surveillance." We hope that this information is helpful to the Committee.

Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget advises that from the standpoint of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable Trent Franks
Ranking Minority Member

Constitutional Limitations on Domestic Surveillance
House Judiciary Committee
Subcomm. on the Constitution, Civil Rights, and Civil Liberties
June 7, 2007
Questions for the Record for Steven G. Bradbury

Questions from Representative Bobby Scott (VA)

1. **Please describe all domestic surveillance programs, including varieties of such programs, authorized by the President after 9/11/2001, and indicate whether such programs were specifically authorized by statute, validated by court decision, and/or approved by the U.S. Attorney General.**

   ANSWER: The United States has undertaken a variety of intelligence activities in order to collect foreign intelligence, including activities to protect the Nation from another terrorist attack. Such activities generally are classified and sensitive. Some of these activities are approved by the Foreign Intelligence Surveillance Court, but others fall outside of that court's jurisdiction. In either case, the Executive Branch ensures that these activities comply with all applicable law. And, consistent with the reporting requirements of the National Security Act and long-standing practice, the Executive Branch notifies Congress of intelligence activities through appropriate briefings, generally to the Intelligence Committees.

2. **In January 2007, the Bush Administration agreed to conduct the NSA's domestic warrantless surveillance program subject to the review and approval of the Foreign Intelligence Surveillance Court. What changes in the TSP were made prior to its submission to the Foreign Intelligence Surveillance Court for its review.**

   ANSWER: As the Attorney General explained in his letter to the Chair and Ranking Member of the Senate Judiciary Committee, on January 10, 2007, the Department of Justice obtained orders from the Foreign Intelligence Surveillance Court ("FISC") authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that at least one of the communicants is a member or agent of al Qaeda or an affiliated terrorist organization. The Attorney General further noted that any electronic surveillance that was occurring as part of the Terrorist Surveillance Program "will now be subject to the approval of the Foreign Intelligence Surveillance Court." He also explained that because of these developments the President had determined not to reauthorize the Program when the last authorization expired.

   We cannot provide additional information in this setting. I note, however, that the Department of Justice and the Intelligence Community have provided extensive and numerous briefings and information to Congress about the Terrorist Surveillance Program. Every member of the Senate Select Committee on Intelligence and the

House Permanent Select Committee on Intelligence has been briefed on the Terrorist Surveillance Program and the referenced FISC orders. Under the National Security Act and long-standing practice, these are the appropriate Committees to address such issues. Furthermore, as you know, the Department agreed to provide limited access to the January 2007 orders of the FISC for certain Members of the House and the Senate and certain cleared staff. As we noted at the time, this arrangement is extraordinary, providing Congress with unprecedented access to FISC documents.

U.S. DEPARTMENT OF JUSTICE DOCUMENT ENTITLED "LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT"

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LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT

As the President has explained, since shortly after the attacks of September 11, 2001, he has authorized the National Security Agency ("NSA") to intercept international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations. The purpose of these intercepts is to establish an early warning system to detect and prevent another catastrophic terrorist attack on the United States. This paper addresses, in an unclassified form, the legal basis for the NSA activities described by the President ("NSA activities").

SUMMARY

On September 11, 2001, the al Qaeda terrorist network launched the deadliest foreign attack on American soil in history. Al Qaeda's leadership repeatedly has pledged to attack the United States again at a time of its choosing, and these terrorist organizations continue to pose a grave threat to the United States. In response to the September 11th attacks and the continuing threat, the President, with broad congressional approval, has acted to protect the Nation from another terrorist attack. In the immediate aftermath of September 11th, the President promised that "[w]e will direct every resource at our command—every means of diplomacy, every tool of intelligence, every tool of law enforcement, every financial influence, and every weapon of war—to the destruction of and to the defeat of the global terrorist network." President Bush Address to a Joint Session of Congress (Sept. 20, 2001). The NSA activities are an indispensable aspect of this defense of the Nation. By targeting the international communications into and out of the United States of persons reasonably believed to be linked to al Qaeda, these activities provide the United States with an early warning system to help avert the next attack. For the following reasons, the NSA activities are lawful and consistent with civil liberties.

The NSA activities are supported by the President's well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs to conduct warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States. The President has the chief responsibility under the Constitution to protect America from attack, and the Constitution gives the President the authority necessary to fulfill that solemn responsibility. The President has made clear that he will exercise all authority available to him, consistent with the Constitution, to protect the people of the United States.

In the specific context of the current armed conflict with al Qaeda and related terrorist organizations, Congress by statute has confirmed and supplemented the President's recognized authority under Article II of the Constitution to conduct such warrantless surveillance to prevent further catastrophic attacks on the homeland. In its first legislative response to the terrorist attacks of September 11th, Congress authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of September 11th in order to prevent "any future acts of international terrorism against the United States." Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (Sept. 18, 2001) (reported as a note to 50 U.S.C.A. § 1541) ("AUMF"). History conclusively demonstrates that warrantless communications intelligence targeted at the enemy in time of armed conflict is a traditional and fundamental incident of the use of military force authorized by the AUMF. The Supreme Court's interpretation of the AUMF in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), confirms that Congress in the AUMF gave its express approval to the military conflict against al Qaeda and its allies and thereby to the President's use of all traditional and accepted incidents of force in this current military conflict—including warrantless electronic surveillance to intercept enemy communications both at home and abroad. This understanding of the AUMF demonstrates Congress's support for the President's authority to protect the Nation and, at the same time, adheres to Justice O'Connor's admonition that "a state of war is not a blank check for the President," *Hamdi*, 542 U.S. at 536 (plurality opinion), particularly in view of the narrow scope of the NSA activities.

The AUMF places the President at the zenith of his powers in authorizing the NSA activities. Under the tripartite framework set forth by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring), Presidential authority is analyzed to determine whether the President is acting in accordance with congressional authorization (category I), whether he acts in the absence of a grant or denial of authority by Congress (category II), or whether he uses his own authority under the Constitution to take actions incompatible with congressional measures (category III). Because of the broad authorization provided in the AUMF, the President's action here falls within category I of Justice Jackson's framework. Accordingly, the President's power in authorizing the NSA activities is at its height because he acted "pursuant to an express or implied authorization of Congress," and his power "includes all that he possesses in his own right plus all that Congress can delegate." *Id.* at 635.

The NSA activities are consistent with the preexisting statutory framework generally applicable to the interception of communications in the United States—the Foreign Intelligence Surveillance Act ("FISA"), as amended, 50 U.S.C. §§ 1801-1862 (2000 & Supp. II 2002), and relevant related provisions in chapter 119 of title 18.[1] Although FISA generally requires judicial approval of electronic surveillance, FISA also contemplates that Congress may authorize such surveillance by a statute other than FISA. *See* 50 U.S.C. § 1809(a) (prohibiting any person from intentionally "engag[ing] . . . in electronic surveillance under color of law except as authorized

[1] Chapter 119 of title 18, which was enacted by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510-2521 (2000 & West Supp. 2005), is often referred to as "Title III."

by statute"). The AUMF, as construed by the Supreme Court in *Hamdi* and as confirmed by the history and tradition of armed conflict, is just such a statute. Accordingly, electronic surveillance conducted by the President pursuant to the AUMF, including the NSA activities, is fully consistent with FISA and falls within category I of Justice Jackson's framework.

Even if there were ambiguity about whether FISA, read together with the AUMF, permits the President to authorize the NSA activities, the canon of constitutional avoidance requires reading these statutes in harmony to overcome any restrictions in FISA and Title III, at least as they might otherwise apply to the congressionally authorized armed conflict with al Qaeda. Indeed, were FISA and Title III interpreted to impede the President's ability to use the traditional tool of electronic surveillance to detect and prevent future attacks by a declared enemy that has already struck at the homeland and is engaged in ongoing operations against the United States, the constitutionality of FISA, as applied to that situation, would be called into very serious doubt. In fact, if this difficult constitutional question had to be addressed, FISA would be unconstitutional as applied to this narrow context. Importantly, the FISA Court of Review itself recognized just three years ago that the President retains constitutional authority to conduct foreign surveillance apart from the FISA framework, and the President is certainly entitled, at a minimum, to rely on that judicial interpretation of the Constitution and FISA.

Finally, the NSA activities fully comply with the requirements of the Fourth Amendment. The interception of communications described by the President falls within a well-established exception to the warrant requirement and satisfies the Fourth Amendment's fundamental requirement of reasonableness. The NSA activities are thus constitutionally permissible and fully protective of civil liberties.

BACKGROUND

A. THE ATTACKS OF SEPTEMBER 11, 2001

On September 11, 2001, the al Qaeda terrorist network launched a set of coordinated attacks along the East Coast of the United States. Four commercial jetliners, each carefully selected to be fully loaded with fuel for a transcontinental flight, were hijacked by al Qaeda operatives. Two of the jetliners were targeted at the Nation's financial center in New York and were deliberately flown into the Twin Towers of the World Trade Center. The third was targeted at the headquarters of the Nation's Armed Forces, the Pentagon. The fourth was apparently headed toward Washington, D.C., when passengers struggled with the hijackers and the plane crashed in Shanksville, Pennsylvania. The intended target of this fourth jetliner was evidently the White House or the Capitol, strongly suggesting that its intended mission was to strike a decapitation blow on the Government of the United States—to kill the President, the Vice President, or Members of Congress. The attacks of September 11th resulted in approximately 3,000 deaths—the highest single-day death toll from hostile foreign attacks in the Nation's history. These attacks shut down air travel in the United States, disrupted the Nation's financial markets and government operations, and caused billions of dollars in damage to the economy.

On September 14, 2001, the President declared a national emergency "by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States." Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001). The same day, Congress passed a joint resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of September 11th, which the President signed on September 18th. AUMF § 2(a). Congress also expressly acknowledged that the attacks rendered it "necessary and appropriate" for the United States to exercise its right "to protect United States citizens both at home and abroad," and in particular recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." *Id.* pmbl. Congress emphasized that the attacks "continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States." *Id.* The United States also launched a large-scale military response, both at home and abroad. In the United States, combat air patrols were immediately established over major metropolitan areas and were maintained 24 hours a day until April 2002. The United States also immediately began plans for a military response directed at al Qaeda's base of operations in Afghanistan. Acting under his constitutional authority as Commander in Chief, and with the support of Congress, the President dispatched forces to Afghanistan and, with the assistance of the Northern Alliance, toppled the Taliban regime.

As the President made explicit in his Military Order of November 13, 2001, authorizing the use of military commissions to try terrorists, the attacks of September 11th "created a state of armed conflict." Military Order § 1(a), 66 Fed. Reg. 57,833 (Nov. 13, 2001). Indeed, shortly after the attacks, NATO—for the first time in its 46-year history—invoked article 5 of the North Atlantic Treaty, which provides that an "armed attack against one or more of [the parties] shall be considered an attack against them all." North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246; *see also* Statement by NATO Secretary General Lord Robertson (Oct. 2, 2001), *available at* http://www.nato.int/docu/speech/2001/s011002a.htm ("[I]t has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty . . . ."). The President also determined in his Military Order that al Qaeda and related terrorists organizations "possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government," and concluded that "an extraordinary emergency exists for national defense purposes." Military Order, § 1(c), (g), 66 Fed. Reg. at 57,833-34.

B. THE NSA ACTIVITIES

Against this unfolding background of events in the fall of 2001, there was substantial concern that al Qaeda and its allies were preparing to carry out another attack within the United States. Al Qaeda had demonstrated its ability to introduce agents into the United States undetected and to perpetrate devastating attacks, and it was suspected that additional agents were

likely already in position within the Nation's borders. As the President has explained, unlike a conventional enemy, al Qaeda has infiltrated "our cities and communities and communicated from here in America to plot and plan with bin Laden's lieutenants in Afghanistan, Pakistan and elsewhere." Press Conference of President Bush (Dec. 19, 2005), *available at* http://www.white-house.gov/news/releases/2005/12/20051219-2.html ("President's Press Conference"). To this day, finding al Qaeda sleeper agents in the United States remains one of the paramount concerns in the War on Terror. As the President has explained, "[t]he terrorists want to strike America again, and they hope to inflict even more damage than they did on September the 11th." *Id.*

The President has acknowledged that, to counter this threat, he has authorized the NSA to intercept international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations. The same day, the Attorney General elaborated and explained that in order to intercept a communication, there must be "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda." Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, *available at* http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html (Dec. 19, 2005) (statement of Attorney General Gonzales). The purpose of these intercepts is to establish an early warning system to detect and prevent another catastrophic terrorist attack on the United States. The President has stated that the NSA activities "ha[ve] been effective in disrupting the enemy, while safeguarding our civil liberties." President's Press Conference.

The President has explained that the NSA activities are "critical" to the national security of the United States. *Id.* Confronting al Qaeda "is not simply a matter of [domestic] law enforcement"—we must defend the country against an enemy that declared war against the United States. *Id.* To "effectively detect enemies hiding in our midst and prevent them from striking us again . . . we must be able to act fast and to detect conversations [made by individuals linked to al Qaeda] so we can prevent new attacks." *Id.* The President pointed out that "a two-minute phone conversation between somebody linked to al Qaeda here and an operative overseas could lead directly to the loss of thousands of lives." *Id.* The NSA activities are intended to help "connect the dots" between potential terrorists. *Id.* In addition, the Nation is facing "a different era, a different war . . . people are changing phone numbers . . . and they're moving quick[ly]." *Id.* As the President explained, the NSA activities "enable[] us to move faster and quicker. And that's important. We've got to be fast on our feet, quick to detect and prevent." *Id.* "This is an enemy that is quick and it's lethal. And sometimes we have to move very, very quickly." *Id.* FISA, by contrast, is better suited "for long-term monitoring." *Id.*

As the President has explained, the NSA activities are "carefully reviewed approximately every 45 days to ensure that [they are] being used properly." *Id.* These activities are reviewed for legality by the Department of Justice and are monitored by the General Counsel and Inspector General of the NSA to ensure that civil liberties are being protected. *Id.* Leaders in Congress from both parties have been briefed more than a dozen times on the NSA activities.

C. THE CONTINUING THREAT POSED BY AL QAEDA

Before the September 11th attacks, al Qaeda had promised to attack the United States. In 1998, Osama bin Laden declared a "religious" war against the United States and urged that it was the moral obligation of all Muslims to kill U.S. civilians and military personnel. *See* Statement of Osama bin Laden, Ayman al-Zawahiri, et al., *Fatwah Urging Jihad Against Americans*, published in Al-Quds al-'Arabi (Feb. 23, 1998) ("To kill the Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque and the holy mosque from their grip, and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim."). Al Qaeda carried out those threats with a vengeance; they attacked the U.S.S. Cole in Yemen, the United States Embassy in Nairobi, and finally the United States itself in the September 11th attacks.

It is clear that al Qaeda is not content with the damage it wrought on September 11th. As recently as December 7, 2005, Ayman al-Zawahiri professed that al Qaeda "is spreading, growing, and becoming stronger," and that al Qaeda is "waging a great historic battle in Iraq, Afghanistan, Palestine, and even in the Crusaders' own homes." Ayman al-Zawahiri, videotape released on Al-Jazeera television network (Dec. 7, 2005). Indeed, since September 11th, al Qaeda leaders have repeatedly promised to deliver another, even more devastating attack on America. *See, e.g.*, Osama bin Laden, videotape released on Al-Jazeera television network (Oct. 24, 2004) (warning United States citizens of further attacks and asserting that "your security is in your own hands"); Osama bin Laden, videotape released on Al-Jazeera television network (Oct. 18, 2003) ("We, God willing, will continue to fight you and will continue martyrdom operations inside and outside the United States . . . ."); Ayman Al-Zawahiri, videotape released on the Al-Jazeera television network (Oct. 9, 2002) ("I promise you [addressing the 'citizens of the United States'] that the Islamic youth are preparing for you what will fill your hearts with horror"). Given that al Qaeda's leaders have repeatedly made good on their threats and that al Qaeda has demonstrated its ability to insert foreign agents into the United States to execute attacks, it is clear that the threat continues. Indeed, since September 11th, al Qaeda has staged several large-scale attacks around the world, including in Indonesia, Madrid, and London, killing hundreds of innocent people.

ANALYSIS

I. THE PRESIDENT HAS INHERENT CONSTITUTIONAL AUTHORITY TO ORDER WARRANTLESS FOREIGN INTELLIGENCE SURVEILLANCE

As Congress expressly recognized in the AUMF, "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," AUMF pmbl., especially in the context of the current conflict. Article II of the Constitution vests in the President all executive power of the United States, including the power to act as Commander in Chief of the Armed Forces, *see* U.S. Const. art. II, § 2, and authority over the conduct of the Nation's foreign affairs. As the Supreme Court has explained, "[t]he President is the sole organ of the nation in its external relations, and its sole representative with

foreign nations." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (internal quotation marks and citations omitted). In this way, the Constitution grants the President inherent power to protect the Nation from foreign attack, *see, e.g.*, *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863), and to protect national security information, *see, e.g.*, *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

To carry out these responsibilities, the President must have authority to gather information necessary for the execution of his office. The Founders, after all, intended the federal Government to be clothed with all authority necessary to protect the Nation. *See, e.g.*, *The Federalist* No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed. 1961) (explaining that the federal Government will be "cloathed with all the powers requisite to the complete execution of its trust"); *id.* No. 41, at 269 (James Madison) ("Security against foreign danger is one of the primitive objects of civil society . . . . The powers requisite for attaining it must be effectually confided to the federal councils."). Because of the structural advantages of the Executive Branch, the Founders also intended that the President would have the primary responsibility and necessary authority as Commander in Chief and Chief Executive to protect the Nation and to conduct the Nation's foreign affairs. *See, e.g.*, *The Federalist* No. 70, at 471-72 (Alexander Hamilton); *see also Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950) ("this [constitutional] grant of war power includes all that is necessary and proper for carrying these powers into execution") (citation omitted). Thus, it has been long recognized that the President has the authority to use secretive means to collect intelligence necessary for the conduct of foreign affairs and military campaigns. *See, e.g.*, *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world."); *Curtiss-Wright*, 299 U.S. at 320 ("He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials."); *Totten v. United States*, 92 U.S. 105, 106 (1876) (President "was undoubtedly authorized during the war, as commander-in-chief . . . to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy").

In reliance on these principles, a consistent understanding has developed that the President has inherent constitutional authority to conduct warrantless searches and surveillance within the United States for foreign intelligence purposes. Wiretaps for such purposes thus have been authorized by Presidents at least since the administration of Franklin Roosevelt in 1940. *See, e.g.*, *United States v. United States District Court*, 444 F.2d 651, 669-71 (6th Cir. 1971) (reproducing as an appendix memoranda from Presidents Roosevelt, Truman, and Johnson). In a Memorandum to Attorney General Jackson, President Roosevelt wrote on May 21, 1940:

> You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigation agents that they are at liberty to secure information by listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies. You are requested furthermore to limit these investigations so conducted to a minimum and limit them insofar as

possible to aliens.

Id. at 670 (appendix A). President Truman approved a memorandum drafted by Attorney General Tom Clark in which the Attorney General advised that "it is as necessary as it was in 1940 to take the investigative measures" authorized by President Roosevelt to conduct electronic surveillance "in cases vitally affecting the domestic security." *Id.* Indeed, while FISA was being debated during the Carter Administration, Attorney General Griffin Bell testified that "the current bill recognizes no inherent power of the President to conduct electronic surveillance, and I want to interpolate here to say that *this does not take away the power [of] the President under the Constitution.*" Foreign Intelligence Electronic Surveillance Act of 1978: Hearings on H.R. 5764, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legislation of the House Comm. on Intelligence, 95th Cong., 2d Sess. 15 (1978) (emphasis added); *see also Katz v. United States*, 389 U.S. 347, 363 (1967) (White, J., concurring) ("Wiretapping to protect the security of the Nation has been authorized by successive Presidents."); *cf.* Amending the Foreign Intelligence Surveillance Act: Hearings Before the House Permanent Select Comm. on Intelligence,103d Cong. 2d Sess. 61 (1994) (statement of Deputy Attorney General Jamie S. Gorelick) ("[T]he Department of Justice believes, and the case law supports, that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes . . . .").

The courts uniformly have approved this longstanding Executive Branch practice. Indeed, every federal appellate court to rule on the question has concluded that, even in peacetime, the President has inherent constitutional authority, consistent with the Fourth Amendment, to conduct searches for foreign intelligence purposes without securing a judicial warrant. *See In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002) ("[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information . . . . *We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power.*") (emphasis added); *accord, e.g., United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973). *But cf. Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (en banc) (dictum in plurality opinion suggesting that a warrant would be required even in a foreign intelligence investigation).

In *United States v. United States District Court*, 407 U.S. 297 (1972) (the "*Keith*" case), the Supreme Court concluded that the Fourth Amendment's warrant requirement applies to investigations of wholly *domestic* threats to security—such as domestic political violence and other crimes. But the Court in the *Keith* case made clear that it was not addressing the President's authority to conduct *foreign* intelligence surveillance without a warrant and that it was expressly reserving that question: "[T]he instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country." *Id.* at 308; *see also id.* at 321-22 & n.20 ("We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents."). That *Keith* does not apply in the context of protecting against a foreign attack has been confirmed by the lower courts. After *Keith*, each of the three courts of appeals

that have squarely considered the question have concluded—expressly taking the Supreme Court's decision into account—that the President has inherent authority to conduct warrantless surveillance in the foreign intelligence context. *See, e.g.*, *Truong Dinh Hung*, 629 F.2d at 913-14; *Butenko*, 494 F.2d at 603; *Brown*, 484 F.2d 425-26.

From a constitutional standpoint, foreign intelligence surveillance such as the NSA activities differs fundamentally from the domestic security surveillance at issue in *Keith*. As the Fourth Circuit observed, the President has uniquely strong constitutional powers in matters pertaining to foreign affairs and national security. "Perhaps most crucially, the executive branch not only has superior expertise in the area of foreign intelligence, it is also constitutionally designated as the pre-eminent authority in foreign affairs." *Truong*, 629 F.2d at 914; *see id.* at 913 (noting that "the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would . . . unduly frustrate the President in carrying out his foreign affairs responsibilities"); *cf. Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.").[2]

The present circumstances that support recognition of the President's inherent constitutional authority to conduct the NSA activities are considerably stronger than were the circumstances at issue in the earlier courts of appeals cases that recognized this power. All of the cases described above addressed inherent executive authority under the foreign affairs power to conduct surveillance in a peacetime context. The courts in these cases therefore had no occasion even to consider the fundamental authority of the President, as Commander in Chief, to gather intelligence in the context of an ongoing armed conflict in which the United States already had suffered massive civilian casualties and in which the intelligence gathering efforts at issue were specifically designed to thwart further armed attacks. Indeed, intelligence gathering is particularly important in the current conflict, in which the enemy attacks largely through clandestine activities and which, as Congress recognized, "pose[s] an unusual and extraordinary threat," AUMF pmbl.

Among the President's most basic constitutional duties is the duty to protect the Nation from armed attack. The Constitution gives him all necessary authority to fulfill that responsibility. The courts thus have long acknowledged the President's inherent authority to take action to protect Americans abroad, *see, e.g., Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186), and to protect the Nation from attack, *see, e.g., The Prize Cases*, 67 U.S. at 668. *See generally Ex parte Quirin*, 317 U.S. 1, 28 (1942) (recognizing that

[2] *Keith* made clear that one of the significant concerns driving the Court's conclusion in the domestic security context was the inevitable connection between perceived threats to domestic security and political dissent. As the Court explained: "Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.'" *Keith*, 407 U.S. at 314; *see also id.* at 320 ("Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent."). Surveillance of domestic groups raises a First Amendment concern that generally is not present when the subjects of the surveillance are foreign powers or their agents.

the President has authority under the Constitution "to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war," including "important incident[s] to the conduct of war," such as "the adoption of measures by the military command . . . to repel and defeat the enemy"). As the Supreme Court emphasized in the *Prize Cases*, if the Nation is invaded, the President is "bound to resist force by force"; "[h]e must determine what degree of force the crisis demands" and need not await congressional sanction to do so. *The Prize Cases*, 67 U.S. at 670; *see also Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring) ("[T]he *Prize Cases* . . . stand for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected."); *id.* at 40 (Tatel, J., concurring) ("[T]he President, as commander in chief, possesses emergency authority to use military force to defend the nation from attack without obtaining prior congressional approval."). Indeed, "in virtue of his rank as head of the forces, [the President] has certain powers and duties with which Congress cannot interfere." *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 61 (1941) (Attorney General Robert H. Jackson) (internal quotation marks omitted). In exercising his constitutional powers, the President has wide discretion, consistent with the Constitution, over the methods of gathering intelligence about the Nation's enemies in a time of armed conflict.

II. THE AUMF CONFIRMS AND SUPPLEMENTS THE PRESIDENT'S INHERENT POWER TO USE WARRANTLESS SURVEILLANCE AGAINST THE ENEMY IN THE CURRENT ARMED CONFLICT

In the Authorization for Use of Military Force enacted in the wake of September 11th, Congress confirms and supplements the President's constitutional authority to protect the Nation, including through electronic surveillance, in the context of the current post-September 11th armed conflict with al Qaeda and its allies. The broad language of the AUMF affords the President, at a minimum, discretion to employ the traditional incidents of the use of military force. The history of the President's use of warrantless surveillance during armed conflicts demonstrates that the NSA surveillance described by the President is a fundamental incident of the use of military force that is necessarily included in the AUMF.

A. THE TEXT AND PURPOSE OF THE AUMF AUTHORIZE THE NSA ACTIVITIES

On September 14, 2001, in its first legislative response to the attacks of September 11th, Congress gave its express approval to the President's military campaign against al Qaeda and, in the process, confirmed the well-accepted understanding of the President's Article II powers. *See* AUMF § 2(a).[3] In the preamble to the AUMF, Congress stated that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," AUMF pmbl., and thereby acknowledged the President's inherent constitutional authority to defend the United States. This clause "constitutes an extraordinarily

[3] America's military response began before the attacks of September 11th had been completed. *See The 9/11 Commission Report* 20 (2004). Combat air patrols were established and authorized "to engage inbound aircraft if they could verify that the aircraft was hijacked." *Id.* at 42.

sweeping recognition of independent presidential *constitutional* power to employ the war power to combat terrorism." Michael Stokes Paulsen, Youngstown *Goes to War,* 19 Const. Comment. 215, 252 (2002). This striking recognition of presidential authority cannot be discounted as the product of excitement in the immediate aftermath of September 11th, for the same terms were repeated by Congress more than a year later in the Authorization for Use of Military Force Against Iraq Resolution of 2002. Pub. L. No. 107-243, pmbl., 116 Stat. 1498, 1500 (Oct. 16, 2002) ("[T]he President has authority under the Constitution to take action in order to deter and prevent acts of international terrorism against the United States . . . ."). In the context of the conflict with al Qaeda and related terrorist organizations, therefore, Congress has acknowledged a broad executive authority to "deter and prevent" further attacks against the United States.

The AUMF passed by Congress on September 14, 2001, does not lend itself to a narrow reading. Its expansive language authorizes the President "to use *all necessary and appropriate force* against those nations, organizations, or persons *he determines* planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." AUMF § 2(a) (emphases added). In the field of foreign affairs, and particularly that of war powers and national security, congressional enactments are to be broadly construed where they indicate support for authority long asserted and exercised by the Executive Branch. *See, e.g., Haig v. Agee*, 453 U.S. 280, 293-303 (1981); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543-45 (1950); *cf. Loving v. United States*, 517 U.S. 748, 772 (1996) (noting that the usual "limitations on delegation [of congressional powers] do not apply" to authorizations linked to the Commander in Chief power); *Dames & Moore v. Regan*, 453 U.S. 654, 678-82 (1981) (even where there is no express statutory authorization for executive action, legislation in related field may be construed to indicate congressional acquiescence in that action). Although Congress's war powers under Article I, Section 8 of the Constitution empower Congress to legislate regarding the raising, regulation, and material support of the Armed Forces and related matters, rather than the prosecution of military campaigns, the AUMF indicates Congress's endorsement of the President's use of his constitutional war powers. This authorization transforms the struggle against al Qaeda and related terrorist organizations from what Justice Jackson called "a zone of twilight," in which the President and the Congress may have concurrent powers whose "distribution is uncertain," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring), into a situation in which the President's authority is at is maximum because "it includes all that he possesses in his own right plus all that Congress can delegate," *id.* at 635. With regard to these fundamental tools of warfare—and, as demonstrated below, warrantless electronic surveillance against the declared enemy is one such tool—the AUMF places the President's authority at its zenith under *Youngstown*.

It is also clear that the AUMF confirms and supports the President's use of those traditional incidents of military force against the enemy, wherever they may be—on United States soil or abroad. The nature of the September 11th attacks—launched on United States soil by foreign agents secreted in the United States—necessitates such authority, and the text of the AUMF confirms it. The operative terms of the AUMF state that the President is authorized to use force "in order to prevent any future acts of international terrorism against the United States," *id.*, an objective which, given the recent attacks within the Nation's borders and the continuing use of air defense throughout the country at the time Congress acted, undoubtedly

contemplated the possibility of military action within the United States. The preamble, moreover, recites that the United States should exercise its rights "to protect United States citizens both *at home* and abroad." *Id.* pmbl. (emphasis added). To take action against those linked to the September 11th attacks involves taking action against individuals within the United States. The United States had been attacked on its own soil—not by aircraft launched from carriers several hundred miles away, but by enemy agents who had resided in the United States for months. A crucial responsibility of the President—charged by the AUMF and the Constitution—was and is to identify and attack those enemies, especially if they were in the United States, ready to strike against the Nation.

The text of the AUMF demonstrates in an additional way that Congress authorized the President to conduct warrantless electronic surveillance against the enemy. The terms of the AUMF not only authorized the President to "use all necessary and appropriate force" against those responsible for the September 11th attacks; it also authorized the President to "determine[]" the persons or groups responsible for those attacks and to take all actions necessary to prevent further attacks. AUMF § 2(a) ("the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons *he determines* planned, authorized, committed, or aided the terrorist attacks that occurred on September 11th, 2001, or harbored such organizations or persons") (emphasis added). Of vital importance to the use of force against the enemy is locating the enemy and identifying its plans of attack. And of vital importance to identifying the enemy and detecting possible future plots was the authority to intercept communications to or from the United States of persons with links to al Qaeda or related terrorist organizations. Given that the agents who carried out the initial attacks resided in the United States and had successfully blended into American society and disguised their identities and intentions until they were ready to strike, the necessity of using the most effective intelligence gathering tools against such an enemy, including electronic surveillance, was patent. Indeed, Congress recognized that the enemy in this conflict poses an "unusual and extraordinary threat." AUMF pmbl.

The Supreme Court's interpretation of the scope of the AUMF in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), strongly supports this reading of the AUMF. In *Hamdi*, five members of the Court found that the AUMF authorized the detention of an American within the United States, notwithstanding a statute that prohibits the detention of U.S. citizens "except pursuant to an Act of Congress," 18 U.S.C. § 4001(a). *See Hamdi*, 542 U.S. at 519 (plurality opinion); *id.* at 587 (Thomas, J., dissenting). Drawing on historical materials and "longstanding law-of-war principles," *id.* at 518-21, a plurality of the Court concluded that detention of combatants who fought against the United States as part of an organization "known to have supported" al Qaeda "is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Id.* at 518; *see also id.* at 587 (Thomas, J., dissenting) (agreeing with the plurality that the joint resolution authorized the President to "detain those arrayed against our troops"); *accord Quirin*, 317 U.S. at 26-29, 38 (recognizing the President's authority to capture and try agents of the enemy in the United States even if they had never "entered the theatre or zone of active military operations"). Thus, even though the AUMF does not say anything expressly about detention, the Court nevertheless found that it satisfied section 4001(a)'s requirement that detention be congressionally authorized.

The conclusion of five Justices in *Hamdi* that the AUMF incorporates fundamental "incidents" of the use of military force makes clear that the absence of any specific reference to signals intelligence activities in the resolution is immaterial. *See Hamdi,* 542 U.S. at 519 ("[I]t is of no moment that the AUMF does not use specific language of detention.") (plurality opinion). Indeed, given the circumstances in which the AUMF was adopted, it is hardly surprising that Congress chose to speak about the President's authority in general terms. The purpose of the AUMF was for Congress to sanction and support the military response to the devastating terrorist attacks that had occurred just three days earlier. Congress evidently thought it neither necessary nor appropriate to attempt to catalog every specific aspect of the use of the forces it was authorizing and every potential preexisting statutory limitation on the Executive Branch. Rather than engage in that difficult and impractical exercise, Congress authorized the President, in general but intentionally broad terms, to use the traditional and fundamental incidents of war and to determine how best to identify and engage the enemy in the current armed conflict. Congress's judgment to proceed in this manner was unassailable, for, as the Supreme Court has recognized, even in normal times involving no major national security crisis, "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take." *Dames & Moore*, 453 U.S. at 678. Indeed, Congress often has enacted authorizations to use military force using general authorizing language that does not purport to catalogue in detail the specific powers the President may employ. The need for Congress to speak broadly in recognizing and augmenting the President's core constitutional powers over foreign affairs and military campaigns is of course significantly heightened in times of national emergency. *See Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("[B]ecause of the changeable and explosive nature of contemporary international relations . . . Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.").

Hamdi thus establishes the proposition that the AUMF "clearly and unmistakably" authorizes the President to take actions against al Qaeda and related organizations that amount to "fundamental incident[s] of waging war." *Hamdi*, 542 U.S. at 519 (plurality opinion); *see also id.* at 587 (Thomas, J., dissenting). In other words, "*[t]he clear inference is that the AUMF authorizes what the laws of war permit.*" Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2048, 2092 (2005) (emphasis added). Congress is presumed to be aware of the Supreme Court's precedents. Indeed, Congress recently enacted legislation in response to the Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004)—which was issued the same day as the *Hamdi* decision—removing habeas corpus jurisdiction over claims filed on behalf of confined enemy combatants held at Guantanamo Bay. Congress, however, has not expressed any disapproval of the Supreme Court's commonsense and plain-meaning interpretation of the AUMF in *Hamdi*.[4]

[4] This understanding of the AUMF is consistent with Justice O'Connor's admonition that "a state of war is not a blank check for the President," *Hamdi*, 542 U.S. at 536 (plurality opinion). In addition to constituting a fundamental and accepted incident of the use of military force, the NSA activities are consistent with the law of armed conflict principle that the use of force be necessary and proportional. *See* Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* 115 (1995). The NSA activities are proportional because they are minimally invasive and narrow in scope, targeting only the international communications of persons reasonably believed to be linked to al Qaeda, and are designed to protect the Nation from a devastating attack.

B. WARRANTLESS ELECTRONIC SURVEILLANCE AIMED AT INTERCEPTING ENEMY COMMUNICATIONS HAS LONG BEEN RECOGNIZED AS A FUNDAMENTAL INCIDENT OF THE USE OF MILITARY FORCE

The history of warfare—including the consistent practice of Presidents since the earliest days of the Republic—demonstrates that warrantless intelligence surveillance against the enemy is a fundamental incident of the use of military force, and this history confirms the statutory authority provided by the AUMF. Electronic surveillance is a fundamental tool of war that must be included in any natural reading of the AUMF's authorization to use "all necessary and appropriate force."

As one author has explained:

> It is *essential* in warfare for a belligerent to be as fully informed as possible about the enemy—his strength, his weaknesses, measures taken by him and measures contemplated by him. This applies not only to military matters, but . . . anything which bears on and is material to his ability to wage the war in which he is engaged. *The laws of war recognize and sanction this aspect of warfare.*

Morris Greenspan, *The Modern Law of Land Warfare* 325 (1959) (emphases added); *see also* Memorandum for Members of the House Permanent Select Comm. on Intel., from Jeffrey H. Smith, *Re: Legal Authorities Regarding Warrantless Surveillance of U.S. Persons* 6 (Jan. 3, 2006) ("Certainly, the collection of intelligence is understood to be necessary to the execution of the war."). Similarly, article 24 of the Hague Regulations of 1907 expressly states that "the employment of measures necessary for obtaining information about the enemy and the country [is] considered permissible." *See also* L. Oppenheim, *International Law* vol. II § 159 (7th ed. 1952) ("War cannot be waged without all kinds of information, about the forces and the intentions of the enemy . . . . To obtain the necessary information, it has always been considered lawful to employ spies . . . ."); Joseph R. Baker & Henry G. Crocker, *The Laws of Land Warfare* 197 (1919) ("Every belligerent has a right . . . to discover the signals of the enemy and . . . to seek to procure information regarding the enemy through the aid of secret agents."); *cf.* J.M. Spaight, *War Rights on Land* 205 (1911) ("[E]very nation employs spies; were a nation so quixotic as to refrain from doing so, it might as well sheathe its sword for ever. . . . Spies . . . are indispensably necessary to a general; and, other things being equal, that commander will be victorious who has the best secret service.") (internal quotation marks omitted).

In accordance with these well-established principles, the Supreme Court has consistently recognized the President's authority to conduct intelligence activities. *See, e.g., Totten v. United States*, 92 U.S. 105, 106 (1876) (recognizing President's authority to hire spies); *Tenet v. Doe*, 544 U.S. 1 (2005) (reaffirming *Totten* and counseling against judicial interference with such matters); *see also Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are not and ought not to be published to the world."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (The President "has his confidential sources of information. He has his agents in the form of diplomatic,

consular, and other officials."). Chief Justice John Marshall even described the gathering of intelligence as a military duty. *See Tatum v. Laird*, 444 F.2d 947, 952-53 (D.C. Cir. 1971) ("As Chief Justice John Marshall said of Washington, 'A general must be governed by his intelligence and must regulate his measures by his information. It is his duty to obtain correct information . . . . '") (quoting Foreword, U.S. Army Basic Field Manual, Vol. X, circa 1938), *rev'd on other grounds*, 408 U.S. 1 (1972).

The United States, furthermore, has a long history of wartime surveillance—a history that can be traced to George Washington, who "was a master of military espionage" and "made frequent and effective use of secret intelligence in the second half of the eighteenth century." Rhodri Jeffreys-Jones, *Cloak and Dollar: A History of American Secret Intelligence* 11 (2002); *see generally id.* at 11-23 (recounting Washington's use of intelligence); *see also Haig v. Agee*, 471 U.S. 159, 172 n.16 (1981) (quoting General Washington's letter to an agent embarking upon an intelligence mission in 1777: "The necessity of procuring good intelligence, is apparent and need not be further urged."). As President in 1790, Washington obtained from Congress a "secret fund" to deal with foreign dangers and to be spent at his discretion. Jeffreys-Jones, *supra*, at 22. The fund, which remained in use until the creation of the Central Intelligence Agency in the mid-twentieth century and gained "longstanding acceptance within our constitutional structure," *Halperin v. CIA*, 629 F.2d 144, 158-59 (D.C. Cir. 1980), was used "for all purposes to which a secret service fund should or could be applied for the public benefit," including "for persons sent publicly and secretly to search for important information, political or commercial," *id.* at 159 (quoting Statement of Senator John Forsyth, Cong. Debates 295 (Feb. 25, 1831)). *See also Totten*, 92 U.S. at 107 (refusing to examine payments from this fund lest the publicity make a "secret service" "impossible").

The interception of communications, in particular, has long been accepted as a fundamental method for conducting wartime surveillance. *See, e.g.*, Greenspan, *supra*, at 326 (accepted and customary means for gathering intelligence "include air reconnaissance and photography; ground reconnaissance; observation of enemy positions; *interception of enemy messages, wireless and other*; examination of captured documents; . . . and interrogation of prisoners and civilian inhabitants") (emphasis added). Indeed, since its independence, the United States has intercepted communications for wartime intelligence purposes and, if necessary, has done so within its own borders. During the Revolutionary War, for example, George Washington received and used to his advantage reports from American intelligence agents on British military strength, British strategic intentions, and British estimates of American strength. *See* Jeffreys-Jones, *supra*, at 13. One source of Washington's intelligence was intercepted British mail. *See* Central Intelligence Agency, *Intelligence in the War of Independence* 31, 32 (1997). In fact, Washington himself proposed that one of his Generals "contrive a means of opening [British letters] without breaking the seals, take copies of the contents, and then let them go on." *Id.* at 32 ("From that point on, Washington was privy to British intelligence pouches between New York and Canada."); *see generally* Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities (the "Church Committee"), S. Rep. No. 94-755, at Book VI, 9-17 (Apr. 23, 1976) (describing Washington's intelligence activities).

More specifically, warrantless electronic surveillance of wartime communications has been conducted in the United States since electronic communications have existed, *i.e.*, since at least the Civil War, when "[t]elegraph wiretapping was common, and an important intelligence source for both sides." G.J.A. O'Toole, *The Encyclopedia of American Intelligence and Espionage* 498 (1988). Confederate General J.E.B. Stuart even "had his own personal wiretapper travel along with him in the field" to intercept military telegraphic communications. Samuel Dash, et al., *The Eavesdroppers* 23 (1971); *see also* O'Toole, *supra*, at 121, 385-88, 496-98 (discussing Civil War surveillance methods such as wiretaps, reconnaissance balloons, semaphore interception, and cryptanalysis). Similarly, there was extensive use of electronic surveillance during the Spanish-American War. *See* Bruce W. Bidwell, *History of the Military Intelligence Division, Department of the Army General Staff:* 1775-1941, at 62 (1986). When an American expeditionary force crossed into northern Mexico to confront the forces of Pancho Villa in 1916, the Army "frequently intercepted messages of the regime in Mexico City or the forces contesting its rule." David Alvarez, *Secret Messages* 6-7 (2000). Shortly after Congress declared war on Germany in World War I, President Wilson (citing only his constitutional powers and the joint resolution declaring war) ordered the censorship of messages sent outside the United States via submarine cables, telegraph, and telephone lines. *See* Exec. Order No. 2604 (Apr. 28, 1917). During that war, wireless telegraphy "enabled each belligerent to tap the messages of the enemy." Bidwell, *supra*, at 165 (quoting statement of Col. W. Nicolai, former head of the Secret Service of the High Command of the German Army, *in* W. Nicolai, *The German Secret Service* 21 (1924)).

As noted in Part I, on May 21, 1940, President Roosevelt authorized warrantless electronic surveillance of persons suspected of subversive activities, including spying, against the United States. In addition, on December 8, 1941, the day after the attack on Pearl Harbor, President Roosevelt gave the Director of the FBI "temporary powers to direct all news censorship and to *control all other telecommunications traffic* in and out of the United States." Jack A. Gottschalk, *"Consistent with Security"... A History of American Military Press Censorship,* 5 Comm. & L. 35, 39 (1983) (emphasis added). *See* Memorandum for the Secretaries of War, Navy, State, and Treasury, the Postmaster General, and the Federal Communications Commission from Franklin D. Roosevelt (Dec. 8, 1941). President Roosevelt soon supplanted that temporary regime by establishing an office for conducting such electronic surveillance in accordance with the War Powers Act of 1941. *See* Pub. L. No. 77-354, § 303, 55 Stat. 838, 840-41 (Dec. 18, 1941); Gottschalk, 5 Comm. & L. at 40. The President's order gave the Government of the United States access to "communications by mail, cable, radio, or other means of transmission passing between the United States and any foreign country." *Id. See also* Exec. Order No. 8985, § 1, 6 Fed. Reg. 6625, 6625 (Dec. 19, 1941). In addition, the United States systematically listened surreptitiously to electronic communications as part of the war effort. *See* Dash, *Eavesdroppers* at 30. During World War II, signals intelligence assisted in, among other things, the destruction of the German U-boat fleet by the Allied naval forces, *see id.* at 27, and the war against Japan, *see* O'Toole, *supra*, at 32, 323-24. In general, signals intelligence "helped to shorten the war by perhaps two years, reduce the loss of life, and make inevitable an eventual Allied victory." Carl Boyd, *American Command of the Sea Through Carriers, Codes, and the Silent Service: World War II and Beyond* 27 (1995); *see also* Alvarez, *supra*, at 1 ("There can be little doubt that signals intelligence contributed significantly to the

military defeat of the Axis."). Significantly, not only was wiretapping in World War II used "extensively by military intelligence and secret service personnel in combat areas abroad," but also "by the FBI and secret service in this country." Dash, *supra*, at 30.

In light of the long history of prior wartime practice, the NSA activities fit squarely within the sweeping terms of the AUMF. The use of signals intelligence to identify and pinpoint the enemy is a traditional component of wartime military operations—or, to use the terminology of *Hamdi*, a "fundamental and accepted . . . incident to war," 542 U.S. at 518 (plurality opinion)—employed to defeat the enemy and to prevent enemy attacks in the United States. Here, as in other conflicts, the enemy may use public communications networks, and some of the enemy may already be in the United States. Although those factors may be present in this conflict to a greater degree than in the past, neither is novel. Certainly, both factors were well known at the time Congress enacted the AUMF. Wartime interception of international communications made by the enemy thus should be understood, no less than the wartime detention at issue in *Hamdi*, as one of the basic methods of engaging and defeating the enemy that Congress authorized in approving "*all* necessary and appropriate force" that the President would need to defend the Nation. AUMF § 2(a) (emphasis added).

* * *

Accordingly, the President has the authority to conduct warrantless electronic surveillance against the declared enemy of the United States in a time of armed conflict. That authority derives from the Constitution, and is reinforced by the text and purpose of the AUMF, the nature of the threat posed by al Qaeda that Congress authorized the President to repel, and the long-established understanding that electronic surveillance is a fundamental incident of the use of military force. The President's power in authorizing the NSA activities is at its zenith because he has acted "pursuant to an express or implied authorization of Congress." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

III. THE NSA ACTIVITIES ARE CONSISTENT WITH THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

The President's exercise of his constitutional authority to conduct warrantless wartime electronic surveillance of the enemy, as confirmed and supplemented by statute in the AUMF, is fully consistent with the requirements of the Foreign Intelligence Surveillance Act ("FISA").[5] FISA is a critically important tool in the War on Terror. The United States makes full use of the authorities available under FISA to gather foreign intelligence information, including authorities to intercept communications, conduct physical searches, and install and use pen registers and trap and trace devices. While FISA establishes certain procedures that must be followed for these authorities to be used (procedures that usually involve applying for and obtaining an order from a special court), FISA also expressly contemplates that a later legislative enactment could

[5] To avoid revealing details about the operation of the program, it is assumed for purposes of this paper that the activities described by the President constitute "electronic surveillance," as defined by FISA, 50 U.S.C. § 1801(f).

authorize electronic surveillance outside the procedures set forth in FISA itself. The AUMF constitutes precisely such an enactment. To the extent there is any ambiguity on this point, the canon of constitutional avoidance requires that such ambiguity be resolved in favor of the President's authority to conduct the communications intelligence activities he has described. Finally, if FISA could not be read to allow the President to authorize the NSA activities during the current congressionally authorized armed conflict with al Qaeda, FISA would be unconstitutional as applied in this narrow context.

A. THE REQUIREMENTS OF FISA

FISA was enacted in 1978 to regulate "electronic surveillance," particularly when conducted to obtain "foreign intelligence information," as those terms are defined in section 101 of FISA, 50 U.S.C. § 1801. As a general matter, the statute requires that the Attorney General approve an application for an order from a special court composed of Article III judges and created by FISA—the Foreign Intelligence Surveillance Court ("FISC"). *See* 50 U.S.C. §§ 1803-1804. The application must demonstrate, among other things, that there is probable cause to believe that the target is a foreign power or an agent of a foreign power. *See id.* § 1805(a)(3)(A). It must also contain a certification from the Assistant to the President for National Security Affairs or an officer of the United States appointed by the President with the advice and consent of the Senate and having responsibilities in the area of national security or defense that the information sought is foreign intelligence information and cannot reasonably be obtained by normal investigative means. *See id.* § 1804(a)(7). FISA further requires the Government to state the means that it proposes to use to obtain the information and the basis for its belief that the facilities at which the surveillance will be directed are being used or are about to be used by a foreign power or an agent of a foreign power. *See id.* § 1804(a)(4), (a)(8).

FISA was the first congressional measure that sought to impose restrictions on the Executive Branch's authority to engage in electronic surveillance for foreign intelligence purposes, an authority that, as noted above, had been repeatedly recognized by the federal courts. *See* Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. Penn. L. Rev. 793, 810 (1989) (stating that the "status of the President's inherent authority" to conduct surveillance "formed the core of subsequent legislative deliberations" leading to the enactment of FISA). To that end, FISA modified a provision in Title III that previously had disclaimed any intent to have laws governing wiretapping interfere with the President's constitutional authority to gather foreign intelligence. Prior to the passage of FISA, section 2511(3) of title 18 had stated that "[n]othing contained in this chapter or in section 605 of the Communications Act of 1934 . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities." 18 U.S.C. § 2511(3) (1970). FISA replaced that provision with an important, though more limited, preservation of authority for the President. *See* Pub. L. No. 95-511, § 201(b), (c), 92 Stat. 1783, 1797 (1978), codified at 18 U.S.C. § 2511(2)(f) (West Supp. 2005) (carving out from statutory regulation only the acquisition of intelligence information from "international or foreign communications" and

"foreign intelligence activities . . . involving a foreign electronic communications system" as long as they are accomplished "utilizing a means other than electronic surveillance as defined in section 101" of FISA). Congress also defined "electronic surveillance," 50 U.S.C. § 1801(f), carefully and somewhat narrowly.[6]

In addition, Congress addressed, to some degree, the manner in which FISA might apply after a formal declaration of war by expressly allowing warrantless surveillance for a period of fifteen days following such a declaration. Section 111 of FISA allows the President to "authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress." 50 U.S.C. § 1811.

The legislative history of FISA shows that Congress understood it was legislating on fragile constitutional ground and was pressing or even exceeding constitutional limits in regulating the President's authority in the field of foreign intelligence. The final House Conference Report, for example, recognized that the statute's restrictions might well impermissibly infringe on the President's constitutional powers. That report includes the extraordinary acknowledgment that "[t]he conferees agree that the establishment by this act of exclusive means by which the President may conduct electronic surveillance does not foreclose a different decision by the Supreme Court." H.R. Conf. Rep. No. 95-1720, at 35, *reprinted in* 1978 U.S.C.C.A.N. 4048, 4064. But, invoking Justice Jackson's concurrence in the *Steel Seizure* case, the Conference Report explained that Congress intended in FISA to exert whatever power Congress constitutionally had over the subject matter to restrict foreign intelligence surveillance and to leave the President solely with whatever inherent constitutional authority he might be able to invoke against Congress's express wishes. *Id.* The Report thus explains that "[t]he intent of the conferees is to apply the standard set forth in Justice Jackson's concurring opinion in the Steel Seizure Case: 'When a President takes measures incompatible with the express or implied

[6] FISA's legislative history reveals that these provisions were intended to exclude certain intelligence activities conducted by the National Security Agency from the coverage of FISA. According to the report of the Senate Judiciary Committee on FISA, "this provision [referencing what became the first part of section 2511(2)(f)] is designed to make clear that the legislation does not deal with international signals intelligence activities as currently engaged in by the National Security Agency and electronic surveillance conducted outside the United States." S. Rep. No. 95-604, at 64 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3965. The legislative history also makes clear that the definition of "electronic surveillance" was crafted for the same reason. *See id.* at 33-34, 1978 U.S.C.C.A.N. at 3934-36. FISA thereby "adopts the view expressed by the Attorney General during the hearings that enacting statutory controls to regulate the National Security Agency and the surveillance of Americans abroad raises problems best left to separate legislation." *Id.* at 64, 1978 U.S.C.C.A.N. at 3965. Such legislation placing limitations on traditional NSA activities was drafted, but never passed. *See* National Intelligence Reorganization and Reform Act of 1978: Hearings Before the Senate Select Committee on Intelligence, 95th Cong., 2d Sess. 999-1007 (1978) (text of unenacted legislation). And Congress understood that the NSA surveillance that it intended categorically to exclude from FISA could include the monitoring of international communications into or out of the United States of U.S. citizens. The report specifically referred to the Church Committee report for its description of the NSA's activities, S. Rep. No. 95-604, at 64 n.63, 1978 U.S.C.C.A.N. at 3965-66 n.63, which stated that "the NSA intercepts messages passing over international lines of communication, some of which have one terminal within the United States. Traveling over these lines of communication, especially those with one terminal in the United States, are messages of Americans . . . ." S. Rep. 94-755, at Book II, 308 (1976). Congress's understanding in the legislative history of FISA that such communications could be intercepted outside FISA procedures is notable.

will of Congress, his power is at the lowest ebb, for then he can rely only upon his own constitutional power minus any constitutional power of Congress over the matter.'" *Id.* (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)); *see also* S. Rep. No. 95-604, at 64, *reprinted in* 1978 U.S.C.C.A.N. at 3966 (same); *see generally* Elizabeth B. Bazen et al., Congressional Research Service, *Re: Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information* 28-29 (Jan. 5, 2006). It is significant, however, that Congress did not decide conclusively to continue to push the boundaries of its constitutional authority in wartime. Instead, Congress reserved the question of the appropriate procedures to regulate electronic surveillance in time of war, and established a fifteen-day period during which the President would be permitted to engage in electronic surveillance without complying with FISA's express procedures and during which Congress would have the opportunity to revisit the issue. *See* 50 U.S.C. § 1811; H.R. Conf. Rep. No. 95-1720, at 34, *reprinted in* 1978 U.S.C.C.A.N. at 4063 (noting that the purpose of the fifteen-day period following a declaration of war in section 111 of FISA was to "allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency").

B. FISA CONTEMPLATES AND ALLOWS SURVEILLANCE AUTHORIZED "BY STATUTE"

Congress did not attempt through FISA to prohibit the Executive Branch from using electronic surveillance. Instead, Congress acted to bring the exercise of that power under more stringent congressional control. *See, e.g.*, H. Conf. Rep. No. 95-1720, at 32, *reprinted in* 1978 U.S.C.C.A.N. 4048, 4064. Congress therefore enacted a regime intended to supplant the President's reliance on his own constitutional authority. Consistent with this overriding purpose of bringing the use of electronic surveillance under *congressional* control and with the commonsense notion that the Congress that enacted FISA could not bind future Congresses, FISA expressly contemplates that the Executive Branch may conduct electronic surveillance outside FISA's express procedures if and when a subsequent statute authorizes such surveillance.

Thus, section 109 of FISA prohibits any person from intentionally "engag[ing] . . . in electronic surveillance under color of law *except as authorized by statute*." 50 U.S.C. § 1809(a)(1) (emphasis added). Because FISA's prohibitory provision broadly exempts surveillance "authorized by statute," the provision demonstrates that Congress did not attempt to regulate through FISA electronic surveillance authorized by Congress through a subsequent enactment. The use of the term "statute" here is significant because it strongly suggests that *any* subsequent authorizing statute, not merely one that amends FISA itself, could legitimately authorize surveillance outside FISA's standard procedural requirements. *Compare* 18 U.S.C. § 2511(1) ("Except as otherwise specifically provided *in this chapter* any person who—(a) intentionally intercepts . . . any wire, oral, or electronic communication[] . . . shall be punished . . . .") (emphasis added); *id.* § 2511(2)(e) (providing a defense to liability to individuals "conduct[ing] electronic surveillance, . . . as authorized by *that Act [FISA]*") (emphasis added). In enacting FISA, therefore, Congress contemplated the possibility that the President might be permitted to conduct electronic surveillance pursuant to a later-enacted statute that did not

incorporate all of the procedural requirements set forth in FISA or that did not expressly amend FISA itself.

To be sure, the scope of this exception is rendered less clear by the conforming amendments that FISA made to chapter 119 of title 18—the portion of the criminal code that provides the mechanism for obtaining wiretaps for law enforcement purposes. Before FISA was enacted, chapter 119 made it a criminal offense for any person to intercept a communication except as specifically provided in that chapter. *See* 18 U.S.C. § 2511(1)(a), (4)(a). Section 201(b) of FISA amended that chapter to provide an exception from criminal liability for activities conducted pursuant to FISA. Specifically, FISA added 18 U.S.C. § 2511(2)(e), which provides that it is not unlawful for "an officer, employee, or agent of the United States . . . to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act." *Id.* § 2511(2)(e). Similarly, section 201(b) of FISA amended chapter 119 to provide that "procedures in this chapter [or chapter 121 (addressing access to stored wire and electronic communications and customer records)] and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted." *Id.* § 2511(2)(f) (West Supp. 2005).[7]

The amendments that section 201(b) of FISA made to title 18 are fully consistent, however, with the conclusion that FISA contemplates that a subsequent statute could authorize electronic surveillance outside FISA's express procedural requirements. Section 2511(2)(e) of title 18, which provides that it is "not unlawful" for an officer of the United States to conduct electronic surveillance "as authorized by" FISA, is best understood as a safe-harbor provision. Because of section 109, the protection offered by section 2511(2)(e) for surveillance "authorized by" FISA extends to surveillance that is authorized by any other statute and therefore excepted from the prohibition of section 109. In any event, the purpose of section 2511(2)(e) is merely to make explicit what would already have been implicit—that those authorized by statute to engage in particular surveillance do not act unlawfully when they conduct such surveillance. Thus, even if that provision had not been enacted, an officer conducting surveillance authorized by statute (whether FISA or some other law) could not reasonably have been thought to be violating Title III. Similarly, section 2511(2)(e) cannot be read to require a result that would be manifestly unreasonable—exposing a federal officer to criminal liability for engaging in surveillance authorized by statute, merely because the authorizing statute happens not to be FISA itself.

Nor could 18 U.S.C. § 2511(2)(f), which provides that the "procedures in this chapter . . . and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance . . . may be conducted," have been intended to trump the commonsense approach of section 109 and preclude a subsequent Congress from authorizing the President to engage in electronic surveillance through a statute other than FISA, using procedures other than those outlined in FISA or chapter 119 of title 18. The legislative history of section 2511(2)(f) clearly indicates an intent to prevent the President from engaging in surveillance except as

[7] The bracketed portion was added in 1986 amendments to section 2511(2)(f). *See* Pub. L. No. 99-508 § 101(b)(3), 100 Stat. 1848, 1850.

authorized by Congress, *see* H.R. Conf. Rep. No. 95-1720, at 32, *reprinted in* 1978 U.S.C.C.A.N. 4048, 4064, which explains why section 2511(2)(f) set forth all then-existing statutory restrictions on electronic surveillance. Section 2511(2)(f)'s reference to "exclusive means" reflected the state of statutory authority for electronic surveillance in 1978 and cautioned the President not to engage in electronic surveillance outside congressionally sanctioned parameters. It is implausible to think that, in attempting to limit the *President's* authority, Congress also limited its own future authority by barring subsequent Congresses from authorizing the Executive to engage in surveillance in ways not specifically enumerated in FISA or chapter 119, or by requiring a subsequent Congress specifically to amend FISA and section 2511(2)(f). There would be a serious question as to whether the Ninety-Fifth Congress could have so tied the hands of its successors. *See, e.g., Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (noting that "one legislature cannot abridge the powers of a succeeding legislature"); *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932) ("[T]he will of a particular Congress . . . does not impose itself upon those to follow in succeeding years"); *Lockhart v. United States*, 126 S. Ct. 699, 703 (2005) (Scalia, J., concurring) (collecting precedent); 1 W. Blackstone, Commentaries on the Laws of England 90 (1765) ("Acts of parliament derogatory from the power of subsequent parliaments bind not"). In the absence of a clear statement to the contrary, it cannot be presumed that Congress attempted to abnegate its own authority in such a way.

Far from a clear statement of congressional intent to bind itself, there are indications that section 2511(2)(f) cannot be interpreted as requiring that *all* electronic surveillance and domestic interception be conducted under FISA's enumerated procedures or those of chapter 119 of title 18 until and unless those provisions are repealed or amended. Even when section 2511(2)(f) was enacted (and no subsequent authorizing statute existed), it could not reasonably be read to preclude all electronic surveillance conducted outside the procedures of FISA or chapter 119 of title 18. In 1978, use of a pen register or trap and trace device constituted electronic surveillance as defined by FISA. *See* 50 U.S.C. §§ 1801(f), (n). Title I of FISA provided procedures for obtaining court authorization for the use of pen registers to obtain foreign intelligence information. But the Supreme Court had, just prior to the enactment of FISA, held that chapter 119 of title 18 did not govern the use of pen registers. *See United States v. New York Tel. Co.*, 434 U.S. 159, 165-68 (1977). Thus, if section 2511(2)(f) were to be read to permit of no exceptions, the use of pen registers for purposes other than to collect foreign intelligence information would have been unlawful because such use would not have been authorized by the "exclusive" procedures of section 2511(2)(f), *i.e.*, FISA and chapter 119. But no court has held that pen registers could not be authorized outside the foreign intelligence context. Indeed, FISA appears to have recognized this issue by providing a defense to liability for any official who engages in electronic surveillance under a search warrant or court order. *See* 50 U.S.C. § 1809(b). (The practice when FISA was enacted was for law enforcement officers to obtain search warrants under the Federal Rules of Criminal Procedure authorizing the installation and use of pen registers. *See S. 1667, A Bill to Amend Title 18, United States Code, with Respect to the Interception of Certain Communications, Other Forms of Surveillance, and for Other Purposes: Hearing Before the Subcomm. On Patents, Copyrights and Trademarks of the Senate*

Comm. on the Judiciary, 99th Cong. 57 (1985) (prepared statement of James Knapp, Deputy Assistant Attorney General, Criminal Division)).[8]

In addition, section 2511(2)(a)(ii) authorizes telecommunications providers to assist officers of the Government engaged in electronic surveillance when the Attorney General certifies that "no warrant or court order is required by law [and] that all statutory requirements have been met." 18 U.S.C. § 2511(2)(a)(ii).[9] If the Attorney General can certify, in good faith, that the requirements of a subsequent statute authorizing electronic surveillance are met, service providers are affirmatively and expressly authorized to assist the Government. Although FISA does allow the Government to proceed without a court order in several situations, *see* 50 U.S.C. § 1805(f) (emergencies); *id.* § 1802 (certain communications between foreign governments), this provision specifically lists only Title III's emergency provision but speaks generally to Attorney General certification. That reference to Attorney General certification is consistent with the historical practice in which Presidents have delegated to the Attorney General authority to approve warrantless surveillance for foreign intelligence purposes. *See, e.g.*, *United States v. United States District Court,* 444 F.2d 651, 669-71 (6th Cir. 1971) (reproducing as an appendix memoranda from Presidents Roosevelt, Truman, and Johnson). Section 2511(2)(a)(ii) thus suggests that telecommunications providers can be authorized to assist with warrantless electronic surveillance when such surveillance is authorized by law outside FISA.

In sum, by expressly and broadly excepting from its prohibition electronic surveillance undertaken "as authorized by statute," section 109 of FISA permits an exception to the "procedures" of FISA referred to in 18 U.S.C. § 2511(2)(f) where authorized by another statute, even if the other authorizing statute does not specifically amend section 2511(2)(f).

C. THE AUMF IS A "STATUTE" AUTHORIZING SURVEILLANCE OUTSIDE THE CONFINES OF FISA

The AUMF qualifies as a "statute" authorizing electronic surveillance within the meaning of section 109 of FISA.

First, because the term "statute" historically has been given broad meaning, the phrase "authorized by statute" in section 109 of FISA must be read to include joint resolutions such as

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[8] Alternatively, section 109(b) may be read to constitute a "procedure" in FISA or to incorporate procedures from sources other than FISA (such as the Federal Rules of Criminal Procedure or state court procedures), and in that way to satisfy section 2511(2)(f). But if section 109(b)'s defense can be so read, section 109(a) should also be read to constitute a procedure or incorporate procedures not expressly enumerated in FISA.

[9] Section 2511(2)(a)(ii) states:

> Notwithstanding any other law, providers of wire or electronic communication service, . . . are authorized by law to provide information, facilities, or technical assistance to persons authorized by law to intercept . . . communications or to conduct electronic surveillance, as defined [by FISA], if such provider . . . has been provided with . . . a certification in writing by [specified persons proceeding under Title III's emergency provision] or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specific assistance is required.

the AUMF. *See American Fed'n of Labor v. Watson*, 327 U. S. 582, 592-93 (1946) (finding the term "statute" as used in 28 U.S.C. § 380 to mean "a compendious summary of various enactments, by whatever method they may be adopted, to which a State gives her sanction"); Black's Law Dictionary 1410 (6th ed. 1990) (defining "statute" broadly to include any "formal written enactment of a legislative body," and stating that the term is used "to designate the legislatively created laws in contradistinction to court decided or unwritten laws"). It is thus of no significance to this analysis that the AUMF was enacted as a joint resolution rather than a bill. *See, e.g., Ann Arbor R.R. Co. v. United States*, 281 U.S. 658, 666 (1930) (joint resolutions are to be construed by applying "the rules applicable to legislation in general"); *United States ex rel. Levey v. Stockslager*, 129 U.S. 470, 475 (1889) (joint resolution had "all the characteristics and effects" of statute that it suspended); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 598 (S.D.N.Y 2002) (in analyzing the AUMF, finding that there is "no relevant constitutional difference between a bill and a joint resolution"), *rev'd sub nom. on other grounds, Rumsfeld v. Padilla*, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 542 U.S. 426 (2004); *see also* Letter for the Hon. John Conyers, Jr., U.S. House of Representatives, from Prof. Laurence H. Tribe at 3 (Jan. 6, 2006) (term "statute" in section 109 of FISA "of course encompasses a joint resolution presented to and signed by the President").

Second, the longstanding history of communications intelligence as a fundamental incident of the use of force and the Supreme Court's decision in *Hamdi v. Rumsfeld* strongly suggest that the AUMF satisfies the requirement of section 109 of FISA for statutory authorization of electronic surveillance. As explained above, it is not necessary to demarcate the outer limits of the AUMF to conclude that it encompasses electronic surveillance targeted at the enemy. Just as a majority of the Court concluded in *Hamdi* that the AUMF authorizes detention of U.S. citizens who are enemy combatants without expressly mentioning the President's long-recognized power to detain, so too does it authorize the use of electronic surveillance without specifically mentioning the President's equally long-recognized power to engage in communications intelligence targeted at the enemy. And just as the AUMF satisfies the requirement in 18 U.S.C. § 4001(a) that no U.S. citizen be detained "except pursuant to an Act of Congress," so too does it satisfy section 109's requirement for statutory authorization of electronic surveillance.[10] In authorizing the President's use of force in response to the September 11th attacks, Congress did not need to comb through the United States Code looking for those restrictions that it had placed on national security operations during times of peace and designate with specificity each traditional tool of military force that it sought to authorize the President to use. There is no historical precedent for such a requirement: authorizations to use

[10] It might be argued that Congress dealt more comprehensively with electronic surveillance in FISA than it did with detention in 18 U.S.C. § 4001(a). Thus, although Congress prohibited detention "except pursuant to an Act of Congress," it combined the analogous prohibition in FISA (section 109(a)) with section 2511(2)(f)'s exclusivity provision. *See* Letter to the Hon. Bill Frist, Majority Leader, U.S. Senate, from Professor Curtis A. Bradley *et al.* at 5 n.6 (Jan. 9, 2006) (noting that section 4001(a) does not "attempt[] to create an exclusive mechanism for detention"). On closer examination, however, it is evident that Congress has regulated detention far more meticulously than these arguments suggest. Detention is the topic of much of the Criminal Code, as well as a variety of other statutes, including those providing for civil commitment of the mentally ill and confinement of alien terrorists. The existence of these statutes and accompanying extensive procedural safeguards, combined with the substantial constitutional issues inherent in detention, *see, e.g., Hamdi*, 542 U.S. at 574-75 (Scalia, J., dissenting), refute any such argument.

military force traditionally have been couched in general language. Indeed, prior administrations have interpreted joint resolutions declaring war and authorizing the use of military force to authorize expansive collection of communications into and out of the United States.[11]

Moreover, crucial to the Framers' decision to vest the President with primary constitutional authority to defend the Nation from foreign attack is the fact that the Executive can act quickly, decisively, and flexibly as needed. For Congress to have a role in that process, it must be able to act with similar speed, either to lend its support to, or to signal its disagreement with, proposed military action. Yet the need for prompt decisionmaking in the wake of a devastating attack on the United States is fundamentally inconsistent with the notion that to do so Congress must legislate at a level of detail more in keeping with a peacetime budget reconciliation bill. In emergency situations, Congress must be able to use broad language that effectively sanctions the President's use of the core incidents of military force. That is precisely what Congress did when it passed the AUMF on September 14, 2001—just three days after the deadly attacks on America. The Capitol had been evacuated on September 11th, and Congress was meeting in scattered locations. As an account emerged of who might be responsible for these attacks, Congress acted quickly to authorize the President to use "all necessary and appropriate force" against the enemy that he determines was involved in the September 11th attacks. Under these circumstances, it would be unreasonable and wholly impractical to demand that Congress specifically amend FISA in order to assist the President in defending the Nation. Such specificity would also have been self-defeating because it would have apprised our adversaries of some of our most sensitive methods of intelligence gathering.[12]

Section 111 of FISA, 50 U.S.C. § 1811, which authorizes the President, "[n]otwithstanding any other law," to conduct "electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by Congress," does not require a different reading of the AUMF. *See also id.* § 1844 (same provision for pen registers); *id.* § 1829 (same provision for physical searches). Section 111 cannot reasonably be read as Congress's final word on electronic surveillance during wartime, thus permanently limiting the President in all

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[11] As noted above, in intercepting communications, President Wilson relied on his constitutional authority and the joint resolution declaring war and authorizing the use of military force, which, as relevant here, provided "that the President [is] authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States." Joint Resolution of Apr. 6, 1917, ch. 1, 40 Stat. 1. The authorization did not explicitly mention interception of communications.

[12] Some have suggested that the Administration declined to seek a specific amendment to FISA allowing the NSA activities "because it was advised that Congress would reject such an amendment," Letter to the Hon. Bill Frist, Majority Leader, U.S. Senate, from Professor Curtis A. Bradley *et al.* 4 & n.4 (Jan. 9, 2005), and they have quoted in support of that assertion the Attorney General's statement that certain Members of Congress advised the Administration that legislative relief "would be difficult, if not impossible." *Id.* at 4 n.4. As the Attorney General subsequently indicated, however, the difficulty with such specific legislation was that it could not be enacted "without compromising the program." *See* Remarks by Homeland Security Secretary Chertoff and Attorney General Gonzales on the USA PATRIOT Act (Dec. 21, 2005), *available at* http://www.dhs.gov/dhspublic/display?content=5285.

circumstances to a mere fifteen days of warrantless military intelligence gathering targeted at the enemy following a declaration of war. Rather, section 111 represents Congress's recognition that it would likely have to return to the subject and provide additional authorization to conduct warrantless electronic surveillance outside FISA during time of war. The Conference Report explicitly stated the conferees' "inten[t] that this [fifteen-day] period will allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency." H.R. Conf. Rep. No. 95-1720, at 34, *reprinted in* 1978 U.S.C.C.A.N. at 4063. Congress enacted section 111 so that the President could conduct warrantless surveillance while Congress considered supplemental wartime legislation.

Nothing in the terms of section 111 disables Congress from authorizing such electronic surveillance as a traditional incident of war through a broad, conflict-specific authorization for the use of military force, such as the AUMF. Although the legislative history of section 111 indicates that in 1978 some Members of Congress believed that any such authorization would come in the form of a particularized amendment to FISA itself, section 111 does not require that result. Nor could the Ninety-Fifth Congress tie the hands of a subsequent Congress in this way, at least in the absence of far clearer statutory language expressly requiring that result. *See supra*, pp. 21-22; *compare, e.g.*, War Powers Resolution, § 8, 50 U.S.C. § 1547(a) ("Authority to introduce United States Armed Forces into hostilities . . . shall not be inferred . . . from any provision of law . . . unless such provision specifically authorizes [such] introduction . . . and states that it is intended to constitute specific statutory authorization within the meaning of this chapter."); 10 U.S.C. § 401 (stating that any other provision of law providing assistance to foreign countries to detect and clear landmines shall be subject to specific limitations and may be construed as superseding such limitations "only if, and to the extent that, such provision specifically refers to this section and specifically identifies the provision of this section that is to be considered superseded or otherwise inapplicable"). An interpretation of section 111 that would disable Congress from authorizing broader electronic surveillance in that form can be reconciled neither with the purposes of section 111 nor with the well-established proposition that "one legislature cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S. (6 Cranch) at 135; *see supra* Part II.B. For these reasons, the better interpretation is that section 111 was not intended to, and did not, foreclose Congress from using the AUMF as the legal vehicle for supplementing the President's existing authority under FISA in the battle against al Qaeda.

The contrary interpretation of section 111 also ignores the important differences between a formal declaration of war and a resolution such as the AUMF. As a historical matter, a formal declaration of war was no longer than a sentence, and thus Congress would not expect a declaration of war to outline the extent to which Congress authorized the President to engage in various incidents of waging war. Authorizations for the use of military force, by contrast, are typically more detailed and are made for the *specific purpose* of reciting the manner in which Congress has authorized the President to act. Thus, Congress could reasonably expect that an authorization for the use of military force would address the issue of wartime surveillance, while a declaration of war would not. Here, the AUMF declares that the Nation faces "an unusual and extraordinary threat," acknowledges that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," and

provides that the President is authorized "to use all necessary and appropriate force" against those "he determines" are linked to the September 11th attacks. AUMF pmbl., § 2. This sweeping language goes far beyond the bare terms of a declaration of war. *Compare*, *e.g.*, Act of Apr. 25, 1898, ch. 189, 30 Stat. 364 ("First. That war be, and the same is hereby declared to exist . . . between the United States of America and the Kingdom of Spain.").

Although legislation that has included a declaration of war has often also included an authorization of the President to use force, these provisions are separate and need not be combined in a single statute. *See*, *e.g.*, *id.* ("Second. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several states, *to such extent as may be necessary to carry this Act into effect.*") (emphasis added). Moreover, declarations of war have legal significance independent of any additional authorization of force that might follow. *See*, *e.g.*, Louis Henkin, *Foreign Affairs and the U.S. Constitution* 75 (2d ed. 1996) (explaining that a formal state of war has various legal effects, such as terminating diplomatic relations, and abrogating or suspending treaty obligations and international law rights and duties); *see also id.* at 370 n.65 (speculating that one reason to fight an undeclared war would be to "avoid the traditional consequences of declared war on relations with third nations or even . . . belligerents").

In addition, section 111 does not cover the vast majority of modern military conflicts. The last declared war was World War II. Indeed, the most recent conflict prior to the passage of FISA, Vietnam, was fought without a formal declaration of war. In addition, the War Powers Resolution, enacted less than five years before FISA, clearly recognizes the distinctions between formal declarations of war and authorizations of force and demonstrates that, if Congress had wanted to include such authorizations in section 111, it knew how to do so. *See*, *e.g.*, 50 U.S.C. § 1544(b) (attempting to impose certain consequences 60 days after reporting the initiation of hostilities to Congress "unless the Congress . . . has declared war *or has enacted a specific authorization for such use*" of military force) (emphasis added). It is possible that, in enacting section 111, Congress intended to make no provision for even the temporary use of electronic surveillance without a court order for what had become the legal regime for most military conflicts. A better reading, however, is that Congress assumed that such a default provision would be unnecessary because, if it had acted through an authorization for the use of military force, the more detailed provisions of that authorization would resolve the extent to which Congress would attempt to authorize, or withhold authorization for, the use of electronic surveillance.[13]

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[13] Some have pointed to the specific amendments to FISA that Congress made shortly after September 11th in the USA PATRIOT Act, Pub. L. No. 107-56, §§ 204, 218, 115 Stat. 272, 281, 291 (2001), to argue that Congress did not contemplate electronic surveillance outside the parameters of FISA. *See* Memorandum for Members of the House Permanent Select Comm. on Intel. from Jeffrey H. Smith, *Re: Legal Authorities Regarding Warrantless Surveillance of U.S. Persons* 6-7 (Jan. 3, 2006). The USA PATRIOT Act amendments, however, do not justify giving the AUMF an unnaturally narrow reading. The USA PATRIOT Act amendments made important corrections in the general application of FISA; they were not intended to define the precise incidents of military force that would be available to the President in prosecuting the current armed conflict against al Qaeda and its allies. Many removed long-standing impediments to the effectiveness of FISA that had contributed to the

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The broad text of the AUMF, the authoritative interpretation that the Supreme Court gave it in *Hamdi*, and the circumstances in which it was passed demonstrate that the AUMF is a statute authorizing electronic surveillance under section 109 of FISA. When the President authorizes electronic surveillance against the enemy pursuant to the AUMF, he is therefore acting at the height of his authority under *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

D. THE CANON OF CONSTITUTIONAL AVOIDANCE REQUIRES RESOLVING IN FAVOR OF THE PRESIDENT'S AUTHORITY ANY AMBIGUITY ABOUT WHETHER FISA FORBIDS THE NSA ACTIVITIES

As explained above, the AUMF fully authorizes the NSA activities. Because FISA contemplates the possibility that subsequent statutes could authorize electronic surveillance without requiring FISA's standard procedures, the NSA activities are also consistent with FISA and related provisions in title 18. Nevertheless, some might argue that sections 109 and 111 of FISA, along with section 2511(2)(f)'s "exclusivity" provision and section 2511(2)(e)'s liability exception for officers engaged in FISA-authorized surveillance, are best read to suggest that FISA requires that subsequent authorizing legislation specifically amend FISA in order to free the Executive from FISA's enumerated procedures. As detailed above, this is not the better reading of FISA. But even if these provisions were ambiguous, any doubt as to whether the AUMF and FISA should be understood to allow the President to make tactical military decisions to authorize surveillance outside the parameters of FISA must be resolved to avoid the serious constitutional questions that a contrary interpretation would raise.

It is well established that the first task of any interpreter faced with a statute that may present an unconstitutional infringement on the powers of the President is to determine whether the statute may be construed to avoid the constitutional difficulty. "[I]f an otherwise acceptable

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maintenance of an unnecessary "wall" between foreign intelligence gathering and criminal law enforcement; others were technical clarifications. *See In re Sealed Case*, 310 F.3d 717, 725-30 (Foreign Int. Surv. Ct. Rev. 2002). The "wall" had been identified as a significant problem hampering the Government's efficient use of foreign intelligence information well before the September 11th attacks and in contexts unrelated to terrorism. *See, e.g., Final Report of the Attorney General's Review Team on the Handling of the Los Alamos National Laboratory Investigation* 710, 729, 732 (May 2000); General Accounting Office, *FBI Intelligence Investigations: Coordination Within Justice on Counterintelligence Criminal Matters Is Limited* (GAO-01-780) 3, 31 (July 2001). Finally, it is worth noting that Justice Souter made a similar argument in *Hamdi* that the USA PATRIOT Act all but compelled a narrow reading of the AUMF. *See* 542 U.S. at 551 ("It is very difficult to believe that the same Congress that carefully circumscribed Executive power over alien terrorists on home soil [in the USA PATRIOT Act] would not have meant to require the Government to justify clearly its detention of an American citizen held on home soil incommunicado."). Only Justice Ginsburg joined this opinion, and the position was rejected by a majority of Justices.

Nor do later amendments to FISA undermine the conclusion that the AUMF authorizes electronic surveillance outside the procedures of FISA. Three months after the enactment of the AUMF, Congress enacted certain "technical amendments" to FISA which, *inter alia*, extended the time during which the Attorney General may issue an emergency authorization of electronic surveillance from 24 to 72 hours. *See* Intelligence Authorization Act for Fiscal Year 2002, Pub. L. No. 107-108, § 314, 115 Stat. 1394, 1402 (2001). These modifications to FISA do not in any way undermine Congress's previous authorization in the AUMF for the President to engage in electronic surveillance outside the parameters of FISA in the specific context of the armed conflict with al Qaeda.

construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems." *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citations omitted); *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). Moreover, the canon of constitutional avoidance has particular importance in the realm of national security, where the President's constitutional authority is at its highest. *See Department of the Navy v. Egan*, 484 U.S. 518, 527, 530 (1988); William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 325 (1994) (describing "[s]uper-strong rule against congressional interference with the President's authority over foreign affairs and national security"). Thus, courts and the Executive Branch typically construe a general statute, even one that is written in unqualified terms, to be implicitly limited so as not to infringe on the President's Commander in Chief powers.

Reading FISA to prohibit the NSA activities would raise two serious constitutional questions, both of which must be avoided if possible: (1) whether the signals intelligence collection the President determined was necessary to undertake is such a core exercise of Commander in Chief control over the Armed Forces during armed conflict that Congress cannot interfere with it at all and (2) whether the particular restrictions imposed by FISA are such that their application would impermissibly impede the President's exercise of his constitutionally assigned duties as Commander in Chief. Constitutional avoidance principles require interpreting FISA, at least in the context of the military conflict authorized by the AUMF, to avoid these questions, if "fairly possible." Even if Congress intended FISA to use the full extent of its constitutional authority to "occupy the field" of "electronic surveillance," as FISA used that term, during peacetime, the legislative history indicates that Congress had not reached a definitive conclusion about its regulation during wartime. *See* H.R. Conf. Rep. No. 95-1720, at 34, *reprinted in* 1978 U.S.C.C.A.N. at 4063 (noting that the purpose of the fifteen-day period following a declaration of war in section 111 of FISA was to "allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency"). Therefore, it is not clear that Congress, in fact, intended to test the limits of its constitutional authority in the context of wartime electronic surveillance.

Whether Congress may interfere with the President's constitutional authority to collect foreign intelligence information through interception of communications reasonably believed to be linked to the enemy poses a difficult constitutional question. As explained in Part I, it had long been accepted at the time of FISA's enactment that the President has inherent constitutional authority to conduct warrantless electronic surveillance for foreign intelligence purposes. Congress recognized at the time that the enactment of a statute purporting to eliminate the President's ability, even during peacetime, to conduct warrantless electronic surveillance to collect foreign intelligence was near or perhaps beyond the limit of Congress's Article I powers. The NSA activities, however, involve signals intelligence performed in the midst of a congressionally authorized armed conflict undertaken to prevent further hostile attacks on the United States. The NSA activities lie at the very core of the Commander in Chief power, especially in light of the AUMF's explicit authorization for the President to take *all* necessary and appropriate military action to stop al Qaeda from striking again. The constitutional principles at stake here thus involve not merely the President's well-established inherent

authority to conduct warrantless surveillance for foreign intelligence purposes during peacetime, but also the powers and duties expressly conferred on him as Commander in Chief by Article II.

Even outside the context of wartime surveillance of the enemy, the source and scope of Congress's power to restrict the President's inherent authority to conduct foreign intelligence surveillance is unclear. As explained above, the President's role as sole organ for the Nation in foreign affairs has long been recognized as carrying with it preeminent authority in the field of national security and foreign intelligence. The source of this authority traces to the Vesting Clause of Article II, which states that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1. The Vesting Clause "has long been held to confer on the President plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject only to limits specifically set forth in the Constitution itself and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers." *The President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the National Security Act*, 10 Op. O.L.C. 159, 160-61 (1986) ("*Timely Notification Requirement Op.*").

Moreover, it is clear that some presidential authorities in this context are beyond Congress's ability to regulate. For example, as the Supreme Court explained in *Curtiss-Wright*, the President "*makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it." 299 U.S. at 319. Similarly, President Washington established early in the history of the Republic the Executive's absolute authority to maintain the secrecy of negotiations with foreign powers, even against congressional efforts to secure information. *See id.* at 320-21. Recognizing presidential authority in this field, the Executive Branch has taken the position that "congressional legislation authorizing extraterritorial diplomatic and intelligence activities is superfluous, and . . . statutes infringing the President's inherent Article II authority would be unconstitutional." *Timely Notification Requirement Op.*, 10 Op. O.L.C. at 164.

There are certainly constitutional limits on Congress's ability to interfere with the President's power to conduct foreign intelligence searches, consistent with the Constitution, within the United States. As explained above, intelligence gathering is at the heart of executive functions. Since the time of the Founding it has been recognized that matters requiring secrecy—and intelligence in particular—are quintessentially executive functions. *See, e.g., The Federalist No. 64*, at 435 (John Jay) (Jacob E. Cooke ed. 1961) ("The convention have done well therefore in so disposing of the power of making treaties, that although the president must in forming them act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest."); *see also Timely Notification Requirement Op.*, 10 Op. O.L.C. at 165; *cf. New York Times Co. v. United States*, 403 U.S. 713, 729-30 (1971) (Stewart, J., concurring) ("[I]t is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the field of international relations and national defense.").

Because Congress has rarely attempted to intrude in this area and because many of these questions are not susceptible to judicial review, there are few guideposts for determining exactly where the line defining the President's sphere of exclusive authority lies. Typically, if a statute is in danger of encroaching upon exclusive powers of the President, the courts apply the constitutional avoidance canon, if a construction avoiding the constitutional issue is "fairly possible." *See, e.g., Egan*, 484 U.S. at 527, 530. The only court that squarely has addressed the relative powers of Congress and the President in this field suggested that the balance tips decidedly in the President's favor. The Foreign Intelligence Surveillance Court of Review recently noted that all courts to have addressed the issue of the President's inherent authority have "held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information." *In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002). On the basis of that unbroken line of precedent, the court "[took] for granted that the President does have that authority," and concluded that, "assuming that is so, FISA could not encroach on the President's constitutional power." *Id.*[14] Although the court did not provide extensive analysis, it is the only judicial statement on point, and it comes from the specialized appellate court created expressly to deal with foreign intelligence issues under FISA.

But the NSA activities are not simply exercises of the President's general foreign affairs powers. Rather, they are primarily an exercise of the President's authority as Commander in Chief during an armed conflict that Congress expressly has authorized the President to pursue. The NSA activities, moreover, have been undertaken specifically to prevent a renewed attack at the hands of an enemy that has already inflicted the single deadliest foreign attack in the Nation's history. The core of the Commander in Chief power is the authority to direct the Armed Forces in conducting a military campaign. Thus, the Supreme Court has made clear that the "President alone" is "constitutionally invested with the entire charge of hostile operations." *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874); *The Federalist* No. 74, at 500 (Alexander Hamilton). "As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy." *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850). As Chief Justice Chase explained in 1866, although Congress has authority to legislate to support the prosecution of a war, Congress may not "*interfere[] with the command of the forces and the conduct of campaigns.* That power and duty belong to the President as commander-in-chief." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in judgment) (emphasis added).

The Executive Branch uniformly has construed the Commander in Chief and foreign affairs powers to grant the President authority that is beyond the ability of Congress to regulate. In 1860, Attorney General Black concluded that an act of Congress, if intended to constrain the President's discretion in assigning duties to an officer in the army, would be unconstitutional:

As commander-in-chief of the army it is your right to decide according to your

[14] In the past, other courts have declined to express a view on that issue one way or the other. *See, e.g., Butenko*, 494 F.2d at 601 ("We do not intimate, at this time, any view whatsoever as the proper resolution of the possible clash of the constitutional powers of the President and Congress.").

> own judgment what officer shall perform any particular duty, and as the supreme executive magistrate you have the power of appointment. Congress could not, if it would, take away from the President, or in anywise diminish the authority conferred upon him by the Constitution.

Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 468 (1860). Attorney General Black went on to explain that, in his view, the statute involved there could probably be read as simply providing "a recommendation" that the President could decline to follow at his discretion. *Id.* at 469-70.[15]

Supreme Court precedent does not support claims of congressional authority over core military decisions during armed conflicts. In particular, the two decisions of the Supreme Court that address a conflict between asserted wartime powers of the Commander in Chief and congressional legislation and that resolve the conflict in favor of Congress—*Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)—are both distinguishable from the situation presented by the NSA activities in the conflict with al Qaeda. Neither supports the constitutionality of the restrictions in FISA as applied here.

Barreme involved a suit brought to recover a ship seized by an officer of the U.S. Navy on the high seas during the so-called "Quasi War" with France in 1799. The seizure had been based upon the officer's orders implementing an act of Congress suspending commerce between the United States and France and authorizing the seizure of American ships bound *to* a French port. The ship in question was suspected of sailing *from* a French port. The Supreme Court held that the orders given by the President could not authorize a seizure beyond the terms of the

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[15] Executive practice recognizes, consistent with the Constitution, some congressional control over the Executive's decisions concerning the Armed Forces. *See, e.g.*, U.S. Const. art. I, § 8, cl. 12 (granting Congress power "to raise and support Armies"). But such examples have not involved congressional attempts to regulate the actual conduct of a military campaign, and there is no comparable textual support for such interference. For example, just before World War II, Attorney General Robert Jackson concluded that the Neutrality Act prohibited President Roosevelt from selling certain armed naval vessels and sending them to Great Britain. *See Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers*, 39 Op. Att'y Gen. 484, 496 (1940). Jackson's apparent conclusion that Congress could control the President's ability to transfer war material does not imply acceptance of direct congressional regulation of the Commander in Chief's control of the means and methods of engaging the enemy in conflict. Similarly, in *Youngstown Sheet & Tube Co. v. Sawyer*, the Truman Administration readily conceded that, if Congress had prohibited the seizure of steel mills by statute, Congress's action would have been controlling. *See* Brief for Petitioner at 150, *Youngstown*, 343 U.S. 579 (1952) (Nos. 744 and 745). This concession implies nothing concerning congressional control over the methods of engaging the enemy.

Likewise, the fact that the Executive Branch has, at times, sought congressional ratification after taking unilateral action in a wartime emergency does not reflect a concession that the Executive lacks authority in this area. A decision to seek congressional support can be prompted by many motivations, including a desire for political support. In modern times, several administrations have sought congressional authorization for the use of military force while preserving the ability to assert the unconstitutionality of the War Powers Resolution. *See, e.g., Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq*, 1 Pub. Papers of George Bush 40 (1991) ("[M]y request for congressional support did not . . . constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution."). Moreover, many actions for which congressional support has been sought—such as President Lincoln's action in raising an Army in 1861—quite likely fall primarily under Congress's core Article I powers.

statute and therefore that the seizure of the ship not in fact bound *to* a French port was unlawful. *See* 6 U.S. at 177-78. Although some commentators have broadly characterized *Barreme* as standing for the proposition that Congress may restrict by statute the means by which the President can direct the Nation's Armed Forces to carry on a war, the Court's holding was limited in at least two significant ways. First, the operative section of the statute in question applied only to *American* merchant ships. *See id.* at 170 (quoting Act of February 9, 1799). Thus, the Court simply had no occasion to rule on whether, even in the limited and peculiar circumstances of the Quasi War, Congress could have placed some restriction on the orders the Commander in Chief could issue concerning direct engagements with enemy forces. Second, it is significant that the statute in *Barreme* was cast expressly, not as a limitation on the conduct of warfare by the President, but rather as regulation of a subject within the core of Congress's enumerated powers under Article I—the regulation of foreign commerce. *See* U.S. Const., art. I, § 8, cl. 3. The basis of Congress's authority to act was therefore clearer in *Barreme* than it is here.

Youngstown involved an effort by the President—in the face of a threatened work stoppage—to seize and to run steel mills. Congress had expressly considered the possibility of giving the President power to effect such a seizure during national emergencies. It rejected that option, however, instead providing different mechanisms for resolving labor disputes and mechanisms for seizing industries to ensure production vital to national defense.

For the Court, the connection between the seizure and the core Commander in Chief function of commanding the Armed Forces was too attenuated. The Court pointed out that the case did not involve authority over "day-to-day fighting in a theater of war." *Id.* at 587. Instead, it involved a dramatic extension of the President's authority over military operations to exercise control over an industry that was vital for producing equipment needed overseas. Justice Jackson's concurring opinion also reveals a concern for what might be termed foreign-to-domestic presidential bootstrapping. The United States became involved in the Korean conflict through President Truman's unilateral decision to commit troops to the defense of South Korea. The President then claimed authority, based upon this foreign conflict, to extend presidential control into vast sectors of the domestic economy. Justice Jackson expressed "alarm[]" at a theory under which "a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture." *Id.* at 642.

Moreover, President Truman's action extended the President's authority into a field that the Constitution predominantly assigns to Congress. *See id.* at 588 (discussing Congress's commerce power and noting that "[t]he Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control"); *see also id.* at 643 (Jackson, J., concurring) (explaining that Congress is given express authority to "'raise and *support* Armies'" and "'to *provide* and *maintain* a Navy'") (quoting U.S. Const. art. I, § 8, cls. 12, 13). Thus, *Youngstown* involved an assertion of executive power that not only stretched far beyond the

President's core Commander in Chief functions, but that did so by intruding into areas where Congress had been given an express, and apparently dominant, role by the Constitution.[16]

The present situation differs dramatically. The exercise of executive authority involved in the NSA activities is not several steps removed from the actual conduct of a military campaign. As explained above, it is an essential part of the military campaign. Unlike the activities at issue in *Youngstown*, the NSA activities are directed at the enemy, and not at domestic activity that might incidentally aid the war effort. And assertion of executive authority here does not involve extending presidential power into areas reserved for Congress. Moreover, the theme that appeared most strongly in Justice Jackson's concurrence in *Youngstown* the fear of presidential bootstrapping—does not apply in this context. Whereas President Truman had used his inherent constitutional authority to commit U.S. troops, here Congress expressly provided the President sweeping authority to use "all necessary and appropriate force" to protect the Nation from further attack. AUMF § 2(a). There is thus no bootstrapping concern.

Finally, *Youngstown* cannot be read to suggest that the President's authority for engaging the enemy is less extensive inside the United States than abroad. To the contrary, the extent of the President's Commander in Chief authority necessarily depends on where the enemy is found and where the battle is waged. In World War II, for example, the Supreme Court recognized that the President's authority as Commander in Chief, as supplemented by Congress, included the power to capture and try agents of the enemy in the United States, even if they never had "entered the theatre or zone of active military operations." *Quirin*, 317 U.S. at 38.[17] In the present conflict, unlike in the Korean War, the battlefield was brought to the United States in the most literal way, and the United States continues to face a threat of further attacks on its soil. In short, therefore, *Youngstown* does not support the view that Congress may constitutionally prohibit the President from authorizing the NSA activities.

The second serious constitutional question is whether the particular restrictions imposed by FISA would impermissibly hamper the President's exercise of his constitutionally assigned duties as Commander in Chief. The President has determined that the speed and agility required to carry out the NSA activities successfully could not have been achieved under FISA.[18] Because the President also has determined that the NSA activities are necessary to the defense of

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[16] *Youngstown* does demonstrate that the mere fact that Executive action might be placed in Justice Jackson's category III does not obviate the need for further analysis. Justice Jackson's framework therefore recognizes that Congress might impermissibly interfere with the President's authority as Commander in Chief or to conduct the Nation's foreign affairs.

[17] It had been recognized long before *Youngstown* that, in a large-scale conflict, the area of operations could readily extend to the continental United States, even when there are no major engagements of armed forces here. Thus, in the context of the trial of a German officer for spying in World War I, it was recognized that "[w]ith the progress made in obtaining ways and means for devastation and destruction, the territory of the United States was certainly within the field of active operations" during the war, particularly in the port of New York, and that a spy in the United States might easily have aided the "hostile operation" of U-boats off the coast. *United States ex rel. Wessels v. McDonald*, 265 F. 754, 764 (E.D.N.Y. 1920).

[18] In order to avoid further compromising vital national security activities, a full explanation of the basis for the President's determination cannot be given in an unclassified document.

the United States from a subsequent terrorist attack in the armed conflict with al Qaeda, FISA would impermissibly interfere with the President's most solemn constitutional obligation—to defend the United States against foreign attack.

Indeed, if an interpretation of FISA that allows the President to conduct the NSA activities were not "fairly possible," FISA would be unconstitutional as applied in the context of this congressionally authorized armed conflict. In that event, FISA would purport to *prohibit* the President from undertaking actions necessary to fulfill his constitutional obligation to protect the Nation from foreign attack in the context of a congressionally authorized armed conflict with an enemy that has already staged the most deadly foreign attack in our Nation's history. A statute may not "*impede* the President's ability to perform his constitutional duty," *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (emphasis added); *see also id.* at 696-97, particularly not the President's most solemn constitutional obligation—the defense of the Nation. *See also In re Sealed Case*, 310 F.3d at 742 (explaining that "FISA could not encroach on the President's constitutional power").

Application of the avoidance canon would be especially appropriate here for several reasons beyond the acute constitutional crises that would otherwise result. First, as noted, Congress did not intend FISA to be the final word on electronic surveillance conducted during armed conflicts. Instead, Congress expected that it would revisit the subject in subsequent legislation. Whatever intent can be gleaned from FISA's text and legislative history to set forth a comprehensive scheme for regulating electronic surveillance during peacetime, that same intent simply does not extend to armed conflicts and declared wars.[19] Second, FISA was enacted during the Cold War, not during active hostilities with an adversary whose mode of operation is to blend in with the civilian population until it is ready to strike. These changed circumstances have seriously altered the constitutional calculus, one that FISA's enactors had already recognized might suggest that the statute was unconstitutional. Third, certain technological changes have rendered FISA still more problematic. As discussed above, when FISA was enacted in 1978, Congress expressly declined to regulate through FISA certain signals intelligence activities conducted by the NSA. *See supra*, at pp. 18-19 & n.6.[20] These same factors weigh heavily in favor of concluding that FISA would be unconstitutional as applied to the current conflict if the canon of constitutional avoidance could not be used to head off a collision between the Branches.

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[19] FISA exempts the President from its procedures for fifteen days following a congressional declaration of war. *See* 50 U.S.C. § 1811. If an adversary succeeded in a decapitation strike, preventing Congress from declaring war or passing subsequent authorizing legislation, it seems clear that FISA could not constitutionally continue to apply in such circumstances.

[20] Since FISA's enactment in 1978, the means of transmitting communications has undergone extensive transformation. In particular, many communications that would have been carried by wire are now transmitted through the air, and many communications that would have been carried by radio signals (including by satellite transmissions) are now transmitted by fiber optic cables. It is such technological advancements that have broadened FISA's reach, not any particularized congressional judgment that the NSA's traditional activities in intercepting such international communications should be subject to FISA's procedures. A full explanation of these technological changes would require a discussion of classified information.

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As explained above, FISA is best interpreted to allow a statute such as the AUMF to authorize electronic surveillance outside FISA's enumerated procedures. The strongest counterarguments to this conclusion are that various provisions in FISA and title 18, including section 111 of FISA and section 2511(2)(f) of title 18, together require that subsequent legislation must reference or amend FISA in order to authorize electronic surveillance outside FISA's procedures and that interpreting the AUMF as a statute authorizing electronic surveillance outside FISA procedures amounts to a disfavored repeal by implication. At the very least, however, interpreting FISA to allow a subsequent statute such as the AUMF to authorize electronic surveillance without following FISA's express procedures is "fairly possible," and that is all that is required for purposes of invoking constitutional avoidance. In the competition of competing canons, particularly in the context of an ongoing armed conflict, the constitutional avoidance canon carries much greater interpretative force.[21]

IV. THE NSA ACTIVITIES ARE CONSISTENT WITH THE FOURTH AMENDMENT

The Fourth Amendment prohibits "unreasonable searches and seizures" and directs that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

[21] If the text of FISA were clear that nothing other than an amendment to FISA could authorize additional electronic surveillance, the AUMF would impliedly repeal as much of FISA as would prevent the President from using "all necessary and appropriate force" in order to prevent al Qaeda and its allies from launching another terrorist attack against the United States. To be sure, repeals by implication are disfavored and are generally not found whenever two statutes are "capable of co-existence." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984). Under this standard, an implied repeal may be found where one statute would "unduly interfere with" the operation of another. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 156 (1976). The President's determination that electronic surveillance of al Qaeda outside the confines of FISA was "necessary and appropriate" would create a clear conflict between the AUMF and FISA. FISA's restrictions on the use of electronic surveillance would preclude the President from doing what the AUMF specifically authorized him to do: use all "necessary and appropriate force" to prevent al Qaeda from carrying out future attacks against the United States. The ordinary restrictions in FISA cannot continue to apply if the AUMF is to have its full effect; those constraints would "unduly interfere" with the operation of the AUMF.

Contrary to the recent suggestion made by several law professors and former government officials, the ordinary presumption against implied repeals is overcome here. *Cf.* Letter to the Hon. Bill Frist, Majority Leader, U.S. Senate, from Professor Curtis A. Bradley et al. at 4 (Jan. 9, 2006). First, like other canons of statutory construction, the canon against implied repeals is simply a presumption that may be rebutted by other factors, including conflicting canons. *Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992); *see also Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001). Indeed, the Supreme Court has declined to apply the ordinary presumption against implied repeals where other canons apply and suggest the opposite result. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765-66 (1985). Moreover, *Blackfeet* suggests that where the presumption against implied repeals would conflict with other, more compelling interpretive imperatives, it simply does not apply at all. *See* 471 U.S. at 766. Here, in light of the constitutional avoidance canon, which imposes the overriding imperative to use the tools of statutory interpretation to avoid constitutional conflicts, the implied repeal canon either would not apply at all or would apply with significantly reduced force. Second, the AUMF was enacted during an acute national emergency, where the type of deliberation and detail normally required for application of the canon against implied repeals was neither practical nor warranted. As discussed above, in these circumstances, Congress cannot be expected to work through every potential implication of the U.S. Code and to define with particularity each of the traditional incidents of the use of force available to the President.

particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The touchstone for review of government action under the Fourth Amendment is whether the search is "reasonable." *See, e.g., Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653 (1995).

As noted above, *see* Part I, all of the federal courts of appeals to have addressed the issue have affirmed the President's inherent constitutional authority to collect foreign intelligence without a warrant. *See In re Sealed Case*, 310 F.3d at 742. Properly understood, foreign intelligence collection in general, and the NSA activities in particular, fit within the "special needs" exception to the warrant requirement of the Fourth Amendment. Accordingly, the mere fact that no warrant is secured prior to the surveillance at issue in the NSA activities does not suffice to render the activities unreasonable. Instead, reasonableness in this context must be assessed under a general balancing approach, "'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *United States v. Knights*, 534 U.S. 112, 118-19 (2001) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). The NSA activities are reasonable because the Government's interest, defending the Nation from another foreign attack in time of armed conflict, outweighs the individual privacy interests at stake, and because they seek to intercept only international communications where one party is linked to al Qaeda or an affiliated terrorist organization.

A. THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT DOES NOT APPLY TO THE NSA ACTIVITIES

In "the criminal context," the Fourth Amendment reasonableness requirement "usually requires a showing of probable cause" and a warrant. *Board of Educ. v. Earls*, 536 U.S. 822, 828 (2002). The requirement of a warrant supported by probable cause, however, is not universal. Rather, the Fourth Amendment's "central requirement is one of reasonableness," and the rules the Court has developed to implement that requirement "[s]ometimes . . . require warrants." *Illinois v. McArthur*, 531 U.S. 326, 330 (2001); *see also, e.g., Earls*, 536 U.S. at 828 (noting that the probable cause standard "is peculiarly related to criminal investigations and may be unsuited to determining the reasonableness of administrative searches where the Government seeks to prevent the development of hazardous conditions") (internal quotation marks omitted).

In particular, the Supreme Court repeatedly has made clear that in situations involving "special needs" that go beyond a routine interest in law enforcement, the warrant requirement is inapplicable. *See Vernonia*, 515 U.S. at 653 (there are circumstances "'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable'") (quoting *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987)); *see also McArthur*, 531 U.S. at 330 ("When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable."). It is difficult to encapsulate in a nutshell all of the different circumstances the Court has found to qualify as "special needs" justifying warrantless searches. But one application in which the Court has found the warrant requirement inapplicable is in circumstances in which the Government faces

an increased need to be able to react swiftly and flexibly, or when there are at stake interests in public safety beyond the interests in ordinary law enforcement. One important factor in establishing "special needs" is whether the Government is responding to an emergency that goes beyond the need for general crime control. *See In re Sealed Case*, 310 F.3d at 745-46.

Thus, the Court has permitted warrantless searches of property of students in public schools, *see New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (noting that warrant requirement would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools"), to screen athletes and students involved in extracurricular activities at public schools for drug use, *see Vernonia*, 515 U.S. at 654-55; *Earls*, 536 U.S. at 829-38, to conduct drug testing of railroad personnel involved in train accidents, *see Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 634 (1989), and to search probationers' homes, *see Griffin*, 483 U.S. 868. Many special needs doctrine and related cases have upheld *suspicionless* searches or seizures. *See, e.g., Illinois v. Lidster*, 540 U.S. 419, 427 (2004) (implicitly relying on special needs doctrine to uphold use of automobile checkpoint to obtain information about recent hit-and-run accident); *Earls*, 536 U.S. at 829-38 (suspicionless drug testing of public school students involved in extracurricular activities); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 449-55 (1990) (road block to check all motorists for signs of drunken driving); *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976) (road block near the border to check vehicles for illegal immigrants); *cf. In re Sealed Case*, 310 F.3d at 745-46 (noting that suspicionless searches and seizures in one sense are a greater encroachment on privacy than electronic surveillance under FISA because they are not based on any particular suspicion, but "[o]n the other hand, wiretapping is a good deal more intrusive than an automobile stop accompanied by questioning"). To fall within the "special needs" exception to the warrant requirement, the purpose of the search must be distinguishable from ordinary general crime control. *See, e.g., Ferguson v. Charleston*, 532 U.S. 67 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32, 41 (2000).

Foreign intelligence collection, especially in the midst of an armed conflict in which the adversary has already launched catastrophic attacks within the United States, fits squarely within the area of "special needs, beyond the normal need for law enforcement" where the Fourth Amendment's touchstone of reasonableness can be satisfied without resort to a warrant. *Vernonia*, 515 U.S. at 653. The Executive Branch has long maintained that collecting foreign intelligence is far removed from the ordinary criminal law enforcement action to which the warrant requirement is particularly suited. *See, e.g.*, Amending the Foreign Intelligence Surveillance Act: Hearings Before the House Permanent Select Comm. on Intelligence, 103d Cong. 2d Sess. 62, 63 (1994) (statement of Deputy Attorney General Jamie S. Gorelick) ("[I]t is important to understand that the rules and methodology for criminal searches are inconsistent with the collection of foreign intelligence and would unduly frustrate the President in carrying out his foreign intelligence responsibilities. . . . [W]e believe that the warrant clause of the Fourth Amendment is inapplicable to such [foreign intelligence] searches."); *see also In re Sealed Case*, 310 F.3d 745. The object of foreign intelligence collection is securing information necessary to protect the national security from the hostile designs of foreign powers like al Qaeda and affiliated terrorist organizations, including the possibility of another foreign attack on the United States. In foreign intelligence investigations, moreover, the targets of surveillance

often are agents of foreign powers, including international terrorist groups, who may be specially trained in concealing their activities and whose activities may be particularly difficult to detect. The Executive requires a greater degree of flexibility in this field to respond with speed and absolute secrecy to the ever-changing array of foreign threats faced by the Nation.[22]

In particular, the NSA activities are undertaken to prevent further devastating attacks on our Nation, and they serve the highest government purpose through means other than traditional law enforcement.[23] The NSA activities are designed to enable the Government to act quickly and flexibly (and with secrecy) to find agents of al Qaeda and its affiliates—an international terrorist group which has already demonstrated a capability to infiltrate American communities without being detected—in time to disrupt future terrorist attacks against the United States. As explained by the Foreign Intelligence Surveillance Court of Review, the nature of the "emergency" posed by al Qaeda "takes the matter out of the realm of ordinary crime control." *In re Sealed Case*, 310 F.3d at 746. Thus, under the "special needs" doctrine, no warrant is required by the Fourth Amendment for the NSA activities.

B. THE NSA ACTIVITIES ARE REASONABLE

As the Supreme Court has emphasized repeatedly, "[t]he touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Knights*, 534 U.S. at 118-19 (quotation marks omitted); *see also Earls*, 536 U.S. at 829. The Supreme Court has found a search reasonable when, under the totality of the circumstances, the importance of the governmental interests outweighs the nature and quality of the intrusion on the individual's Fourth Amendment interests. *See Knights*, 534 U.S. at 118-22. Under the standard

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[22] Even in the domestic context, the Supreme Court has recognized that there may be significant distinctions between wiretapping for ordinary law enforcement purposes and domestic national security surveillance. *See United States v. United States District Court*, 407 U.S. 297, 322 (1972) ("*Keith*") (explaining that "the focus of domestic [security] surveillance may be less precise than that directed against more conventional types of crime" because often "the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency"); *see also United States v. Duggan*, 743 F.2d 59, 72 (2d Cir. 1984) (reading *Keith* to recognize that "the governmental interests presented in national security investigations differ substantially from those presented in traditional criminal investigations"). Although the Court in *Keith* held that the Fourth Amendment's warrant requirement does apply to investigations of purely *domestic* threats to national security—such as domestic terrorism, it suggested that Congress consider establishing a lower standard for such warrants than that set forth in Title III. *See id.* at 322-23 (advising that "different standards" from those applied to traditional law enforcement "may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of the Government for intelligence information and the protected rights of our citizens"). *Keith*'s emphasis on the need for flexibility applies with even greater force to surveillance directed at *foreign* threats to national security. *See* S. Rep. No. 95-701, at 16 ("Far more than in domestic security matters, foreign counterintelligence investigations are 'long range' and involve 'the interrelation of various sources and types of information.'") (quoting *Keith*, 407 U.S. at 322). And flexibility is particularly essential here, where the purpose of the NSA activities is to prevent another armed attack against the United States.

[23] This is not to say that traditional law enforcement has no role in protecting the Nation from attack. The NSA activities, however, are not directed at bringing criminals to justice but at detecting and preventing plots by a declared enemy of the United States to attack it again.

balancing of interests analysis used for gauging reasonableness, the NSA activities are consistent with the Fourth Amendment.

With respect to the individual privacy interests at stake, there can be no doubt that, as a general matter, interception of telephone communications implicates a significant privacy interest of the individual whose conversation is intercepted. The Supreme Court has made clear at least since *Katz v. United States*, 389 U.S. 347 (1967), that individuals have a substantial and constitutionally protected reasonable expectation of privacy that their telephone conversations will not be subject to governmental eavesdropping. Although the individual privacy interests at stake may be substantial, it is well recognized that a variety of governmental interests—including routine law enforcement and foreign-intelligence gathering—can overcome those interests.

On the other side of the scale here, the Government's interest in engaging in the NSA activities is the most compelling interest possible—securing the Nation from foreign attack in the midst of an armed conflict. One attack already has taken thousands of lives and placed the Nation in state of armed conflict. Defending the Nation from attack is perhaps the most important function of the federal Government—and one of the few express obligations of the federal Government enshrined in the Constitution. *See* U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, *and shall protect each of them against Invasion* . . . .") (emphasis added); *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863) ("If war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force."). As the Supreme Court has declared, "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981).

The Government's overwhelming interest in detecting and thwarting further al Qaeda attacks is easily sufficient to make reasonable the intrusion into privacy involved in intercepting one-end foreign communications where there is "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda." Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, *available at* http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html (Dec. 19, 2005) (statement of Attorney General Gonzales); *cf. Edmond*, 531 U.S. at 44 (noting that "the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack" because "[t]he exigencies created by th[at] scenario[] are far removed" from ordinary law enforcement). The United States has already suffered one attack that killed thousands, disrupted the Nation's financial center for days, and successfully struck at the command and control center for the Nation's military. And the President has stated that the NSA activities are "critical" to our national security. Press Conference of President Bush (Dec. 19, 2005). To this day, finding al Qaeda sleeper agents in the United States remains one of the preeminent concerns of the war on terrorism. As the President has explained, "[t]he terrorists want to strike America again, and they hope to inflict even more damage than they did on September 11th." *Id.*

Of course, because the magnitude of the Government's interest here depends in part upon the threat posed by al Qaeda, it might be possible for the weight that interest carries in the balance to change over time. It is thus significant for the reasonableness of the NSA activities that the President has established a system under which he authorizes the surveillance only for a limited period, typically for 45 days. This process of reauthorization ensures a periodic review to evaluate whether the threat from al Qaeda remains sufficiently strong that the Government's interest in protecting the Nation and its citizens from foreign attack continues to outweigh the individual privacy interests at stake.

Finally, as part of the balancing of interests to evaluate Fourth Amendment reasonableness, it is significant that the NSA activities are limited to intercepting international communications where there is a reasonable basis to conclude that one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. This factor is relevant because the Supreme Court has indicated that in evaluating reasonableness, one should consider the "efficacy of [the] means for addressing the problem." *Vernonia*, 515 U.S. at 663; *see also Earls*, 536 U.S. at 834 ("Finally, this Court must consider the nature and immediacy of the government's concerns and the efficacy of the Policy in meeting them."). That consideration does not mean that reasonableness requires the "least intrusive" or most "narrowly tailored" means for obtaining information. To the contrary, the Supreme Court has repeatedly rejected such suggestions. *See, e.g., Earls*, 536 U.S. at 837 ("[T]his Court has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means, because the logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.") (internal quotation marks omitted); *Vernonia*, 515 U.S. at 663 ("We have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."). Nevertheless, the Court has indicated that some consideration of the efficacy of the search being implemented—that is, some measure of fit between the search and the desired objective—is relevant to the reasonableness analysis. The NSA activities are targeted to intercept international communications of persons reasonably believed to be members or agents of al Qaeda or an affiliated terrorist organization, a limitation which further strongly supports the reasonableness of the searches.

In sum, the NSA activities are consistent with the Fourth Amendment because the warrant requirement does not apply in these circumstances, which involve both "special needs" beyond the need for ordinary law enforcement and the inherent authority of the President to conduct warrantless electronic surveillance to obtain foreign intelligence to protect our Nation from foreign armed attack. The touchstone of the Fourth Amendment is reasonableness, and the NSA activities are certainly reasonable, particularly taking into account the nature of the threat the Nation faces.

CONCLUSION

For the foregoing reasons, the President—in light of the broad authority to use military force in response to the attacks of September 11th and to prevent further catastrophic attack expressly conferred on the President by the Constitution and confirmed and supplemented by

Congress in the AUMF—has legal authority to authorize the NSA to conduct the signals intelligence activities he has described. Those activities are authorized by the Constitution and by statute, and they violate neither FISA nor the Fourth Amendment.

LETTER FROM THE COMMITTEE ON THE JUDICIARY, DATED JANUARY 19, 2007, TO THE HONORABLE ALBERTO R. GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. DEPARTMENT OF JUSTICE

U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515–6216
One Hundred Tenth Congress

January 19, 2007

The Honorable Alberto R. Gonzales
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Gonzales:

We write to ask that you arrange a classified briefing of all of the Members of the House Judiciary Committee, along with selected staff with appropriate security clearance, concerning the Administration's new domestic wiretapping program referred to in your January 17 letter to House and Senate members. While we appreciate your offer to brief the Chair and Ranking Member of the Committee, that is insufficient to permit the Committee of principal jurisdiction concerning the Foreign Intelligence Surveillance Act ("FISA") to do our job on behalf of the American people. We would note that just last year the Department arranged a classified briefing of our Members when you were seeking changes to FISA.

We would also ask that you provide us with copies of the new court orders, under classified cover, so that we may be better informed on the new program. We would note that the Chief Judge of the FISC, U.S. District Judge Colleen Kollar-Kotelly, has no objection to the FISC orders being released to us in that manner.

In your January 17 letter, you stated that you had altered course and decided to seek court approval for the wiretapping program conducted by the National Security Agency. While the letter states that the Foreign Intelligence Surveillance Court ("FISC") issued the necessary orders on January 10, a number of important questions remain unanswered.

For instance, it is unclear whether the FISC issued blanket orders authorizing surveillance for groups or categories of individuals. The Department also has not stated whether the Administration is engaged in any other surveillance or searches, outside the publicly-known NSA program, without judicial review. Finally, your own letter restates the Department's position that the initial program was within the law, raising the question of whether the Administration will return to the use of warrantless surveillance at some point in the future.

We would appreciate immediate consideration of our request. Please reply through the Judiciary Committee office, 2138 Rayburn House Office Building, Washington, DC 20515 (tel: 202-225-3951; fax: 202-225-7680).

Sincerely,

cc: Honorable Richard A. Hertling

LETTER FROM THE COMMITTEE ON THE JUDICIARY, DATED FEBRUARY 1, 2007, TO THE HONORABLE ALBERTO R. GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. DEPARTMENT OF JUSTICE

JOHN CONYERS, JR., MICHIGAN
CHAIRMAN

LAMAR S. SMITH, TEXAS
RANKING MINORITY MEMBER

U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515–6216
One Hundred Tenth Congress

February 1, 2007

The Honorable Alberto R. Gonzales
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

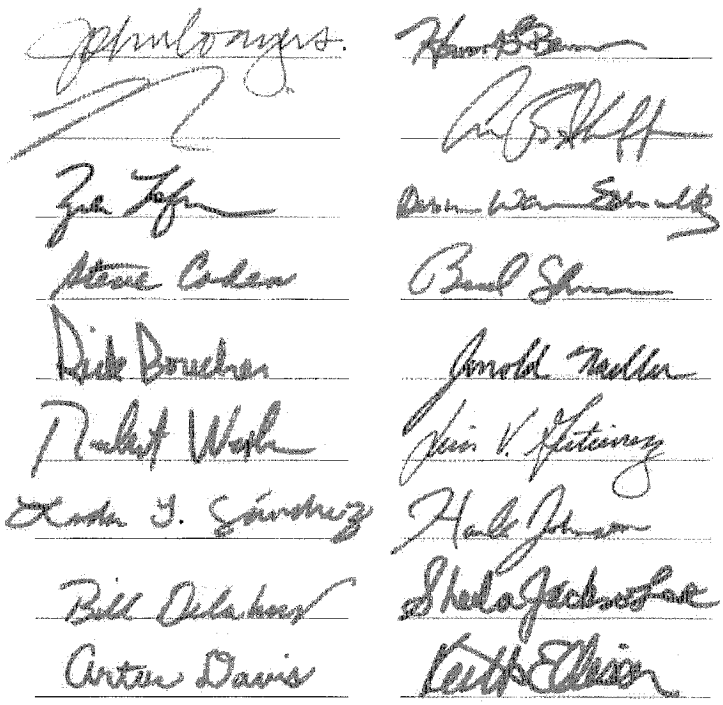
Dear Mr. Gonzales:

We write in an effort to obtain a full briefing of members of the House Judiciary Committee concerning the legal orders and related materials concerning the president's warrantless wiretapping program. Notwithstanding your proposal to allow Chairman Conyers to review these materials, it really is imperative that all members of the Judiciary Committee have access to them so that members may perform their oversight function under the law. There is little point in allowing only the Chair and Ranking Member to review these materials, when it is the entire committee that has oversight responsibility.

In a January 19, 2007, letter, many of us requested that you arrange a classified briefing of all of the Members of the House Judiciary Committee, along with selected staff with appropriate security clearance, concerning the Administration's new domestic wiretapping program referred to in your January 17th letter to House and Senate members. In that same January 19th letter, we also requested that you provide us with copies of the new court orders, under classified cover, so that we may be better informed on the new program, noting that the Chief Judge of the FISC, U.S. District Judge Colleen Kollar-Kotelly, has no objection to the FISC orders being released to us in that manner. As of today, there has been no response to our requests.

Important questions regarding the FISA program remain unanswered and responses to our requests are critical in order for the Judiciary Committee to properly evaluate the efficacy and legitimacy of the warrantless surveillance program. We would appreciate your prompt responses to today's renewed requests. Please reply through the Judiciary Committee office, 2138 Rayburn House Office Building, Washington, DC 20515 (tel: 202-225-3951; fax: 202-225-7680).

Sincerely,



cc: Honorable Richard A. Hertling

LETTER FROM RICHARD A. HERTLING, ACTING ASSISTANT ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, DATED FEBRUARY 9, 2007, TO THE HONORABLE JOHN CONYERS, JR., CHAIRMAN, COMMITTEE ON THE JUDICIARY

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 9, 2007

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This responds to your letters, dated January 19, 2007 and February 1, 2007, which requested a briefing and access to documents for Judiciary Committee members and selected staff, regarding the Terrorist Surveillance Program (TSP) and the recent orders of a Judge of the Foreign Intelligence Surveillance Court (FISC), dated January 10, 2007, and described in the Attorney General's letter of January 17, 2007. Pursuant to the Committee's request, we are replying through the Judiciary Committee office, and have copied the other Members who joined in your letter to us.

Members of the Intelligence Committees have been read into the TSP, based upon the President's decision, and those Committees have been briefed on the new orders, consistent with their oversight authority relating to intelligence matters and the National Security Act. Copies of these highly classified documents, specifically the January 10, 2007 orders, the Government's applications and certain of the exhibits attached to the applications, have been provided to both Intelligence Committees. We note that these documents contain information involving intelligence sources and methods and that the provision of FISA applications to even these Committees is an extraordinary action. Moreover, the Intelligence Committees have agreed to strict access limitations with respect to these documents.

The President has further decided to permit you, as Chairman of the Judiciary Committee, and Ranking Member Smith, to review these documents at the Intelligence Committee's facility for handling sensitive compartmented information, and to be briefed about the orders of January 10, 2007. This decision does not involve reading you into the TSP. Instead, our goal is to provide you and the Ranking Member with information about our legal position on the Foreign Intelligence Surveillance Act and the opportunity to review the pertinent documents in this matter.

In the ordinary course, we believe that all Committee members should have access to documents and other information we provide in response to Committee requests, but the operational character and extraordinary sensitivity of this information do not permit such access in this instance. We have, however, taken the extraordinary step of allowing access to the Chair and Ranking Member to highly sensitive documents that would normally be reviewed only by the Intelligence Committees. We understand that Ranking Member Smith has already received a briefing on this matter and has had the opportunity to review the documents at the House Permanent Select Committee on Intelligence. We hope that you will avail yourself of the same opportunities in the near future.

We appreciate your interest in this matter and look forward to working with you as Chairman of the Committee. Please do not hesitate to contact this office if you would like additional assistance regarding this or any other matter.

Sincerely,

Richard A. Hertling

Richard A. Hertling
Acting Assistant Attorney General

Cc: The Honorable Lamar Smith
Ranking Minority Member

The Honorable Howard L. Berman
The Honorable Rick Boucher
The Honorable Jerrold Nadler
The Honorable Robert C. "Bobby" Scott
The Honorable Melvin L. Watt
The Honorable Zoe Lofgren
The Honorable Sheila Jackson-Lee
The Honorable Maxine Waters
The Honorable Martin T. Meehan
The Honorable William D. Delahunt
The Honorable Robert Wexler
The Honorable Linda T. Sanchez
The Honorable Steve Cohen
The Honorable Henry C. "Hank" Johnson, Jr.
The Honorable Luis V. Gutierrez
The Honorable Brad Sherman
The Honorable Anthony D. Weiner
The Honorable Adam B. Schiff
The Honorable Artur Davis
The Honorable Debbie Wasserman Schultz
The Honorable Keith Ellison

LETTER FROM THE COMMITTEE ON THE JUDICIARY, DATED MAY 17, 2007, TO THE HONORABLE ALBERTO R. GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, U.S. DEPARTMENT OF JUSTICE

ONE HUNDRED TENTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951

http://www.house.gov/judiciary

May 17, 2007

The Honorable Alberto R. Gonzales
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 30530

Dear Mr. Attorney General:

We are writing about disturbing new revelations concerning NSA domestic wiretapping activities and about the Department's continuing refusal to provide Judiciary Committee members with access to information about the current version of the NSA's wiretapping program. Congress' oversight responsibilities require that, on a confidential basis if necessary, you provide answers to the troubling questions that have been raised.

Former Deputy Attorney General Comey testified this week about a dramatic series of events in March, 2004 concerning the Justice Department's conclusion that a classified Administration program, widely believed to be the Terrorist Surveillance Program, was not legal as then conducted and that the Department could not certify its legality without alteration. After an unsuccessful effort by you and then-White House Chief of Staff Andrew Card to convince Attorney General Ashcroft to certify the program from his hospital bed, Mr. Comey explained, the program was reauthorized without Department certification, but was subsequently changed pursuant to the President's direction and then certified by the Department. This would appear to contradict your testimony to both the House and the Senate in 2006 that there was not serious disagreement within the Department about the Terrorist Surveillance Program as confirmed by the President in late 2005. The Department has recently stated that you stand by this testimony.

These facts raise extremely disturbing questions about just what wiretapping or other activity was being conducted by the Administration that its own Justice Department lawyers concluded had no proper legal basis. In the exercise of its oversight responsibilities, it is crucial that Congress ascertain the full picture of what happened. In particular, we ask for a prompt response, under classified cover if necessary, to the following questions: 1) Is Mr. Comey's testimony about the events of March, 2004 as provided this week to the Senate Judiciary

Committee (a copy of which is enclosed with this letter) accurate and, if not, please explain your version of what happened; 2) Was the classified program referred to by Mr. Comey the Terrorist Surveillance Program, as it existed prior to the changes made according to the Justice Department's recommendations and, if not, what was the classified program that Mr. Comey was referring to? 3) Who was involved in deciding to seek approval from Attorney General Ashcroft from his hospital bed and who made the telephone call to arrange your visit to his bedside; 4) What was the basis for the Administration's decision on March 10-11 to continue with the program despite the Department's objections, how long did it so continue. Please provide copies of any legal or other memoranda on the subject; 5) What was the basis for the Department's objections to the program. Please provide copies of any Office of Legal Counsel or other documents relating to those objections; and 6) What changes were made to the program to resolve the Department's objections?

We similarly remain extremely concerned about your continuing refusal to provide access for House Judiciary Committee members to information on the Administration's current version of the domestic wiretapping program described in your January 17, 2007, letter to House and Senate members. We believe that your refusal violates applicable legal requirements and precedents, and threatens to effectively eliminate meaningful Judiciary Committee oversight and legislative activity concerning this crucial issue.

Specifically, your January 17 letter informed us that the Foreign Intelligence Surveillance Court (FISC) had recently issued orders authorizing the government to engage in electronic surveillance of certain communications into or out of the United States, and that any electronic surveillance that had been occurring as part of the Administration's Terrorist Surveillance Program (TSP) will now be conducted subject to the approval of the FISC. Your letter also stated, however, that although Intelligence Committee members had been briefed on the orders and the program, you offered to brief only the Chairman and Ranking Member of the Judiciary Committee concerning the wiretapping program. In response to several written requests to you, Assistant Attorney General Hertling reiterated in a February 9, 2007, letter that only the Chairman and the Ranking Member could review and receive a briefing on the new FISC orders and surveillance program, even though all Intelligence Committee members "have been briefed on the new orders, consistent with their oversight authority."

Your position, however, fails to account for the fact that the Judiciary Committee also has crucial oversight authority in this area – the need for which was highlighted by Mr. Comey's testimony – and which simply cannot be exercised without the access that has been requested, and is contrary to law and precedent. Specifically:

1. The Judiciary Committee has oversight and legislative authority in this area requiring access to the requested information. House Rule X specifically provides that the Judiciary Committee has jurisdiction over the judiciary and judicial proceedings, espionage, civil liberties, criminal law enforcement, and federal courts and judges. The Judiciary Committee's oversight responsibility for the Foreign Intelligence Surveillance Act (FISA) extends as far back as its initial drafting. The Committee shared in the drafting and amendment of FISA, from the time it was introduced, through the adoption of the PATRIOT Act, and through the hearings and deliberations on PATRIOT Act reauthorization. The Committee's jurisdiction also clearly encompasses the FISC itself, which is an Article III court comprised of Article III judges, as well as the Department of Justice, which made the relevant requests to FISC and will continue to do so. Last year, the House Judiciary Committee and Congress considered specific proposals to change FISA. This year, questions have been raised as to whether, in light of the TSP and the FISC rules now governing such surveillance, changes should be considered to FISA or the FISC. The Administration is again seeking changes to FISA which will come before this Committee for consideration. Without access to the information requested, it is impossible for the Judiciary Committee to even consider any of these proposals.

2. FISA itself recognizes the principle that all legislative committees must be able to obtain access to even confidential information in order to carry out their legislative functions, as do House Rules. 50 U.S.C. § 1808(a)(1) requires the Attorney General to give a detailed report to the Intelligence Committees on electronic surveillance under FISA, and then goes on to state specifically that "[n]othing in this subchapter shall be deemed to limit the authority and responsibility of the appropriate committees of each House of Congress to obtain such information as they may need to carry out their respective functions and duties." House Rule X, clause 11(b)(3) similarly provides that nothing concerning the authority of the House Intelligence Committee "shall be construed as prohibiting or otherwise restricting the authority of any other committee to study and review an intelligence or intelligence-related activity to the extent that such activity directly affects a matter otherwise within the jurisdiction of that committee," as in this case.

3. The House Judiciary Committee, as well as other committees in addition to the Intelligence Committees, often obtain confidential intelligence-related information in carrying out their duties. Examples range from classified reports provided by you to the Judiciary Committee relating to the use of FISA and PATRIOT Act authority to the recent National Intelligence Estimate, which was provided to the House Armed Services and International Affairs committees and to an Appropriations subcommittee.

4. Only when the law so provides specifically or when the Committee and the Executive Branch agree can information be provided only to the Committee chairman and ranking member. In a few particular instances, such as the provisions of the National Security Act of 1947 concerning presidential notification to Congress about "covert action," Congress has specifically authorized the President to limit disclosure to specified Congressional leaders, including the chairman and ranking member of selected committees. See 50 U.S.C. 413b(c)(2). Otherwise, such limited disclosure has occurred only where the Executive Branch and the Committee agree. Most recently, for example, the President sought to restrict disclosure of information on the pre-FISA NSA warrantless wiretapping program to the chairman and ranking member of the intelligence committees, but then authorized access for the entire committees when they so requested, as in this case.

5. Court precedent similarly supports Committee access to the information requested. As the Supreme Court recognized many years ago, a "legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions the legislation is intended to affect or change." McGrain v. Daugherty, 273 U.S. 135, 175 (1927). Indeed, the D.C. Circuit specifically declined to uphold an Executive Branch claim that it could withhold confidential national security information from a subcommittee of the House Committee on Interstate and Foreign Commerce, since that would contradict the "equally legitimate assertion of authority by Congress to conduct investigations relevant to its legislative function." United States v. A.T.& T, 567 F.2d 121, 131-33 (D.C. Cir, 1977). The Executive Branch and the Committee later reached agreement on access to the information concerning the investigation, which concerned allegations of warrantless national security wiretapping.

6. The description by the President's own representative, White House Press Secretary Tony Snow, of the recent actions by the FISC make clear that much of the information requested should be provided to the Judiciary Committee under FISA itself. In a January 17, 2007 press briefing, Mr. Snow said, *inter alia*, that "[t]he FISA Court has published the rules under which [surveillance] activities may be conducted," that "the Foreign Intelligence Surveillance Court has put together its guidelines and its rules "governing the conduct of such surveillance, and that the Administration's electronic surveillance activities will "continue[] under the rules that have been laid out by the court." Press Briefing by Tony Snow, Jan. 17, 2007 (available at http://www.whitehouse.gov/news/releases/2007/01/20070117-5.html). FISA itself explicitly requires that FISC rules and procedures be reported specifically to the House Judiciary Committee, among others. See 50 U.S.C. 1803(f)(2)(F). In light of the mandate of FISA itself, and the representations of the White House Press Secretary, the

full Judiciary Committee should have complete access to the new FISC rules discussed by Mr. Snow.

7. The FISC has no objections to Congressional access to the information, and the standards of access applied to the Intelligence Committee can be applied to the Judiciary Committee as well. In response to a letter from the Senate Judiciary Committee, the Chief Judge of the FISC, U.S. District Judge Colleen Kollar-Kotelly, has indicated that she has no objection to the FISC orders being provided to Congress. We are mindful and respectful of your concerns regarding the sensitive information contained in these documents. However, just as you have created a way for the Intelligence Committees to review them, so too must the same avenue exist for Judiciary Committee review. All members of the House Judiciary Committee have executed an oath, pursuant to House Rule XXIII, clause 13, not to disclose classified information received in the course of their duties. Judiciary Committee members, like those of the Intelligence Committees, could agree to additional strict access limitations with respect to the requested documents and information.

Important questions regarding FISA and the domestic wiretapping program remain unanswered, and access to the requested information is essential in order for the entire Judiciary Committee to carry out its legislative responsibilities. It is up to Congress, not the Executive Branch acting unilaterally, to determine how and by what committees oversight should be undertaken of judicial and executive branch functions, but your position would effectively eliminate meaningful Judiciary Committee oversight and legislative activity in this important area. We ask that you respond personally to this letter and to each of the specific points above and work with us to provide the information requested as soon as possible.

Sincerely,

John Conyers, Jr.
Chairman

Jerrold Nadler
Chairman, Subcommittee on the Constitution, Civil Rights and Civil Liberties

Enclosure

cc: Hon. Richard A. Hertling
Hon. Lamar S. Smith
Hon. Trent Franks